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No. 2165

United States
Circuit Court of Appeals

For the Ninth Circuit.

CHOEMON KIKUCHI,

Plaintiff in Error,

VS.

E. E. RITCHIE,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court
for the Territory of Alaska,
Third Division.

FILED

AUG 22 1912

Records of U. S. Circuit
Court of Appeals
for the Fifth Circuit

1894-1895 Record

No. 2165

United States
Circuit Court of Appeals
For the Ninth Circuit.

CHOEMON KIKUCHI,

Plaintiff in Error,

VS.

E. E. RITCHIE,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court
for the Territory of Alaska,
Third Division.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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*In the District Court for the Territory of Alaska,
Third Division.*

No. 555.

E. E. RITCHIE,

Plaintiff,

vs.

CHOEMON KIKUCHI,

Defendant.

Names and Addresses of Attorneys of Record.

THOMAS P. GERAGHTY and JOHN LYONS,
Attorneys for Plaintiff and Defendant in Error.

Addresses: Valdez, Alaska.

THOMAS R. SHEPARD, Attorney for Defendant
and Plaintiff in Error.

Address: Valdez, Alaska.

*In the District Court for the Territory of Alaska,
Third Division.*

No. 555.

E. E. RITCHIE,

Plaintiff,

vs.

CHOEMON KIKUCHI,

Defendant.

Amended Complaint.

Now comes the plaintiff and by leave of Court first
had and obtained files this his amended complaint
herein and alleges:

I.

That plaintiff is an attorney and counselor at law

and proctor in admiralty, duly admitted to practice law in the District Court of Alaska, and the Circuit Court of Appeals of the Ninth Circuit of the United States.

II.

That on the 12th day of November, 1910, at Valdez, Alaska, the defendant, through and by his duly authorized agent, Matsutaro Numazaki, entered into a contract in writing with plaintiff whereby he retained plaintiff as proctor for himself and the schooner "Tokai Maru," and as attorney for the captain, officers and crew of said schooner, which said schooner was at all times mentioned in this complaint, and for several months prior thereto, the property of defendant, and had been libeled by the United States in the District Court of Alaska, Third Division, for alleged violation of the act of Congress known as the alien fishing law, and the said Matsutaro Numazaki being the master thereof. That said contract provided, among other stipulations and agreements, that plaintiff, as proctor, [1*] should represent said schooner and the interests of defendant as owner thereof in said libel proceeding, and if plaintiff should secure the release in said District Court of said schooner on payment of a fine of Five Hundred Dollars and costs, plaintiff should receive a fee of One Thousand Dollars for his services.

It was further provided that said plaintiff was retained by defendant in all matters growing out of said law violation, and that if said forfeiture case should go to the Appellate Courts, plaintiff was to re-

*Page number appearing at foot of page of original certified Record.

ceive such further compensation in addition to that stipulated for in the District Court, as might be agreed on with the owner. A copy of said contract is annexed hereto, marked Exhibit "A" and made a part hereof.

III.

That pursuant to said agreement and contract plaintiff filed a stipulation for costs as required by law, in said libel proceeding, secured an order in said District Court setting aside the order of default theretofore entered in said libel proceeding against said schooner, and permitting defendant to interpose a defense to said libel and make a claim of ownership. Plaintiff, as proctor for defendant, then filed defendant's answer to the libel and claim of ownership of said schooner, and in behalf of defendant conducted the defense to said libel proceeding at the hearing thereof in said District Court. That after the District Court had made and entered a decree of forfeiture in said proceeding holding said schooner subject to a lien of Five Hundred Dollars for a fine of that amount imposed by said Court upon a finding that it had engaged in violation of said act of Congress, and a further lien of Nineteen Thousand Dollars for fines imposed upon the captain, officers and crew of said schooner by the justice's court of Unalaska Precinct, in said territory and division, defendant's agents, Matsutaro Numazaki aforesaid, and Kinyo Okajima, conferred and advised with plaintiff concerning the steps necessary to be taken to perfect an appeal from said decree to the Circuit Court of Appeals [2] having jurisdic-

tion of appeals from Alaska District Courts, with the distinct understanding and agreement with plaintiff that pursuant to the written contract hereinbefore mentioned, plaintiff should represent defendant's interests in such appeal in the Circuit Court of Appeals. That soon thereafter said agents departed for Seattle, Washington, taking with them from plaintiff's office files, copies of all pleadings, motions and orders in the cause, and other documents bearing thereon, upon the express agreement that the same were to be delivered to P. C. Sullivan, a reputable lawyer of Seattle, whom plaintiff desired to associate with himself in the appellate proceedings if it should be agreed by the plaintiff and defendant to employ additional counsel in the case; that in violation of said agreement and of plaintiff's written contract of employment, said agents delivered said files and documents to one James Kiefer, and without plaintiff's knowledge or consent employed said Kiefer to conduct defendant's said case in the Circuit Court of Appeals, and said Kiefer thereupon took and thereafter kept said files and documents and all management of said case out of plaintiff's hands and under his own control, and appeared as proctor for defendant in the Circuit Court of Appeals, utterly ignoring plaintiff, who was at all times ready, willing and fully prepared to take any and all necessary action in and about said appeal, either in Alaska or in the city of San Francisco, where said appeal was required by law to be heard. That after defendant's said agents had left Valdez for Seattle, the Japanese consul at Seattle, acting, as plaintiff is informed and

believes, for defendant, sent a cable message to plaintiff asking him to perform further service in behalf of defendant as claimant and owner of said schooner, and after said Kiefer had been retained in said case as aforesaid, said Japanese consul at Seattle, acting, as plaintiff is informed and believes, in behalf of defendant, sent a cable message to plaintiff, requesting him to perform further [3] service in behalf of defendant as claimant and owner of said schooner, both of which requests plaintiff complied with, supposing himself to be still retained in the case.

That therefore, on or about the 5th day of September, 1911, the Circuit Court of Appeals of the Ninth Circuit reversed the decision of the District Court of Alaska in said cause, holding that the schooner was not liable for the payment of said fines against the members of the crew of said schooner, and the captain and officers thereof, and remanding the case to the said District Court for further proceedings in accordance with said opinion, pursuant to which mandate the District Court entered an order releasing said schooner from the lien of all fines except Five Hundred Dollars against the schooner and five hundred dollars against the ship's company as a whole.

That the reasonable value of plaintiff's services to defendant in the premises and of the services he was willing to and would have performed under said contract had he not been prevented by defendant's breach thereof, after crediting \$200 paid thereon and the plaintiff's consequent damage because of defendant's breach of said contract, is the sum of Eighteen

Hundred Dollars. That defendant has paid plaintiff \$200, and no more, for all said services.

Wherefore plaintiff asks judgment against defendant for the sum of Eighteen Hundred Dollars and the costs of this action.

JOHN LYONS and
T. P. GERAGHTY,
Attorneys for Plaintiff.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Mar. 23, 1912. Ed M. Lakin, Clerk. By V. A. Paine, Deputy. [4]

United States of America,
Territory of Alaska,—ss.

E. E. Ritchie, being duly sworn, says he is the plaintiff in this action; that he has read the foregoing amended complaint and he believes the same to be true.

E. E. RITCHIE.

Sworn to and subscribed before me this 23d day of March, 1912.

[Seal]

THOS. P. GERAGHTY,
Notary Public.

Exhibit "A" [to Amended Complaint].

Valdez, Alaska, November 12, 1910.

Matsutaro Numazaki, master of the Schooner Tokai Maru, seized by United States officers as forfeited for violation of the alien fishing law of the United States, hereby retains E. E. Ritchie as proctor and attorney for said Schooner and her captain, officers and crew, in all matters arising out of the alleged law violation.

The said E. E. Ritchie agrees to appear as proctor in admiralty to resist the forfeiture of said schooner, in the district court of Alaska. He also agrees to undertake to secure the discharge of said captain and crew, now confined in the federal jail at Valdez, Alaska, under an alleged conviction and commitment for violation of said fishing law. For the foregoing services it is agreed that said Ritchie is to receive the following compensation:

If the said captain and crew are obliged to serve out their time and the release of said schooner is secured in the district court of Alaska on payment of the fine of Five Hundred dollars and costs, the said attorney is to receive one thousand dollars (\$1,000.00) American [5] money. If the discharge of said captain and crew is secured before the expiration of their sentences and the entire prosecution and forfeiture abandoned and said schooner released without fine, said attorney is to receive Fifteen Hundred Dollars, American money, and the \$245 already deposited for costs. If the forfeiture case goes to the Appellate Courts said attorney is to receive such further compensation as may be agreed on with the owner.

E. E. RITCHIE.

MATSUTARO NUMAZAKI.

(Signature of Numazaki in Japanese.)

Witness: W. KINO.

Service of copy of amended complaint admitted this 23d day of March, 1912.

THOMAS R. SHEPARD,

Def's Atty.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Mar. 23, 1912. Ed M. Lakin, Clerk. By V. A. Paine, Deputy. [6]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 555.

E. E. RITCHIE,

Plaintiff,

versus

CHOEMON KIKUCHI,

Defendant.

**Motion for Order Requiring Separate Causes of
Action in Amended Complaint to be Separately
Stated.**

Now comes the defendant in this action and moves the Court for an order requiring the separate causes of action alleged and set forth in the plaintiff's amended complaint herein to be separately stated by amendment thereof.

This motion is made upon the ground that said amended complaint comprises two causes of action blended together in one statement thereof, to wit: a cause of action for breach of the written agreement, a copy whereof is set forth as Exhibit "A" appended to said amended complaint, and a cause of action to recover compensation for services alleged to have been rendered by the plaintiff in behalf of the defendant upon the request of the Japanese consul at Seattle, as set forth in the last sentence of paragraph

3 of said amended complaint; and is based on said amended complaint and on all the files, records and proceedings in this action.

Dated at Valdez, Alaska, April 6th, 1912.

THOMAS R. SHEPARD,
Defendant's Attorney.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Apr. 8, 1912. Ed M. Lakin, Clerk. By V. A. Paine, Deputy. [7]

*In the District Court for the Territory of Alaska,
Third Division.*

General March, 1912, Term—April 8th—21st Court
Day.

No. 555—Clerk's Memorandum of Minute.

E. E. RITCHIE,

Plaintiff,

vs.

CHOEMON KIKUCHI,

Defendant.

Order Denying Motion to Separate Causes of Action.

Entered in Journal No. 6, Page No. 712.

This matter coming on to be heard upon defendant's motion for an order requiring separate causes of action in amended complaint to be separately stated, Brown & Lyons and T. P. Geraghty appearing as attorneys on behalf of the plaintiff, Thos. R. Shepard appearing as attorney for defendant, and after arguments had and the Court being fully advised in the premises,—

IT IS ORDERED that said motion be and the same is hereby denied. [8]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 555.

E. E. RITCHIE,

Plaintiff,

vs.

CHOEMON KIKUCHI,

Defendant.

Demurrer to Amended Complaint.

Now comes the defendant in this action and demurs to the amended complaint herein upon the ground, appearing on the face thereof, that said amended complaint does not state facts sufficient to constitute a cause of action against this defendant.

Dated April 8th, 1912.

THOMAS R. SHEPARD,
Defendant's Attorney.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Apr. 13, 1912. Ed M. Lakin, Clerk. By Thos. S. Scott, Deputy. [9]

*In the District Court for the Territory of Alaska,
Third Division.*

General March, 1912, Term—April 13th—23d Court
Day.

No. 555—Clerk's Memorandum of Minute.

E. E. RITCHIE,

Plaintiff,

vs.

CHOEMON KIKUCHI,

Defendant.

Order Overruling Demurrer and Setting for Trial.

Entered in Journal No. 6, page No. 721.

This matter coming on to be heard upon defendant's demurrer to plaintiff's amended complaint, John Lyons and T. P. Geraghty appearing as attorneys for plaintiffs, Thos. R. Shepard as attorney for defendant, and after arguments had, and the Court being fully advised in the premises,—

IT IS ORDERED that the defendant have 5 days within which to answer; and

IT IS FURTHER ORDERED that the trial of the above cause be and the same is hereby set for May 9th, 1912, at the hour of ten o'clock A. M. [10]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 555.

E. E. RITCHIE,

Plaintiff,

vs.

CHOEMON KIKUCHI,

Defendant.

Answer to Amended Complaint.

The defendant in this action answers the plaintiff's amended complaint as follows:

I.

The defendant, answering paragraph I of said complaint, says that he has no knowledge or information sufficient to form a belief as to the allegation therein contained that the plaintiff is admitted to practice law in the United States Circuit Court of Appeals for the Ninth Circuit, and therefore he denies said allegation.

II.

The defendant, answering paragraph II of said complaint, admits that on or about the 12th day of November, 1910, the defendant, through Matsutaro Numasaki, his agent, authorized in that regard, entered into the written contract with the plaintiff, a copy whereof is attached to said complaint marked Exhibit "A" and made a part thereof and in said paragraph referred to; but he denies all such allegations of said paragraph, relative to said written contract or any part of its contents, as are or may be at

variance with the tenor of said instrument itself.

III.

The defendant, answering paragraph III of said complaint, admits that pursuant to said contract the plaintiff [11] filed in said libel proceeding a stipulation on the part of the defendant herein for costs, and secured an order in said District Court setting aside the order of default previously entered therein against said schooner, and then, as proctor for the defendant, filed defendant's claim of ownership of said schooner and in his behalf conducted the defense to said libel proceeding at the hearing thereof in said District Court, and as attorney instituted and conducted a *habeas corpus* proceeding in said District Court to determine the legality of the imprisonment of the captain, officers and crew of said schooner.

The defendant further admits that after the District Court had made and entered a decree holding said schooner subject to a lien of five hundred dollars for a fine imposed by said Court upon a finding that it had engaged in violation of the Act of Congress in said complaint referred to, and a further lien of nineteen thousand dollars for the fines imposed upon said captain, officers and crew by commissioner's court as in said complaint mentioned, the defendant's agents soon thereafter departed for Seattle in the State of Washington, and that they engaged one James Kiefer, in said complaint mentioned, to conduct the defendant's case in the Circuit Court of Appeals, and that said Kiefer thereupon and thereafter appeared as proctor for the defendant in the Circuit Court of Appeals. But the defendant denies each

and every allegation in said paragraph III contained, not hereinabove in this paragraph expressly admitted.

IV.

The defendant, answering paragraph V of said complaint, denies that the plaintiff performed or was willing to perform any services for the defendant to which he became or would have become, under the terms of the contract, entitled to any compensation whatever, and denies that the reasonable value of any such services was or is the sum of [12] eighteen hundred dollars or any sum whatever, and denies that the defendant has broken said contract, and denies that the plaintiff has been damaged, because of any such breach or otherwise, in the sum of eighteen hundred dollars, or in any sum whatever.

II.

And for a second further and separate answer to said amended complaint, and new matter in abatement of the plaintiff's alleged cause of action therein set forth, the defendant alleges that said libel proceeding is still pending on appeal, having been removed by writ of certiorari, allowed and issued by the Supreme Court of the United States to said Circuit Court of Appeals, into said Supreme Court, where the same is now pending and undetermined.

WHEREFORE, the defendant, having fully answered said amended complaint, demands judgment that the same be dismissed and he go thereof without day, and recover of the plaintiff his costs herein.

THOMAS R. SHEPARD,

Defendant's Attorney.

United States of America,
District of Alaska,—ss.

Thomas R. Shepard, being sworn, says: I am the defendant's attorney in the above-entitled action, and make this affidavit of verification of his foregoing answer to the amended complaint therein, in his behalf and stead, because he is absent from the District of Alaska. I am acquainted with the contents of said amended complaint and with the contents of said answer thereto, and I believe said answer to be true.

THOMAS R. SHEPARD.

Subscribed and sworn to before me this 18th day of April, 1912.

JOHN LYONS,
Notary Public.

Service admitted April 18th, 1912.

T. P. GERAGHTY,
Attorney for Plaintiff.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. May 9, 1912. Ed M. Lakin, Clerk. By Thos. S. Scott, Deputy. [13]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 555.

E. E. RITCHIE,

Plaintiff,

versus

CHOEMON KIKUCHI,

Defendant.

Demurrer to Answer.

Now comes the plaintiff by his attorneys, T. P. Geraghty and John Lyons, and demurs to the second defense of defendant's answer to plaintiff's amended complaint filed herein, set up in the second subdivision of said answer as a "further and separate answer to said amended complaint, and new matter in abatement of the plaintiff's alleged cause of action," upon the ground that said second defense does not state facts sufficient to constitute a defense to plaintiff's cause of action stated in the amended complaint.

T. P. GERAGHTY and
JOHN LYONS,

Attorneys for Plaintiff.

Service of copy acknowledged this 19th day of April, 1912.

THOMAS R. SHEPARD.
M. CRITTENDEN,
Attorney for Defendant.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Apr. 19, 1912. Ed M. Lakin, Clerk. By Thos. S. Scott, Deputy. [14]

*In the District Court for the Territory of Alaska,
Third Division.*

General March, 1912 Term—April 27—32 Court Day.

No. 555—Clerk's Memorandum of Minute.

E. E. RITCHIE,

Plaintiff,

vs.

CHOEMON KIKUCHI,

Defendant.

Order Sustaining Temporary Demurrer.

Entered in Journal No. 6, page No. 770.

This matter coming on to be heard upon plaintiff's demurrer to defendant's answer to the amended complaint on file herein, John Lyons and T. P. Geraghty appearing as attorneys on behalf of the plaintiff, and T. R. Shepard appearing as attorney on behalf of the defendant, and after arguments had and the Court being fully advised in the premises,—

IT IS ORDERED that said demurrer be and the same is hereby sustained. [15]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 555.

E. E. RITCHIE,

Plaintiff,

vs.

CHOEMON KIKUCHI,

Defendant.

Motion for Continuance.

Now comes the defendant in this action and moves the Court for an order granting a continuance of the trial herein until the next term of this court to be held at Valdez, to begin on June 24th, 1912, which motion is based on the affidavit hereto attached and herewith served, and upon all the files, records and proceedings herein, and is made on the grounds shown therefor in said affidavit.

Dated May 3, 1912.

THOMAS R. SHEPARD,
Defendant's Attorney.

NOTICE OF HEARING.

To Messrs. Thomas P. Geraghty and John Lyons,
Plaintiff's Attorneys:

Take notice that the defendant in the above-entitled action will bring the foregoing motion to a hearing before the above-named court in Valdez, on May 4, 1912, at the opening of the court on that day or as soon thereafter as counsel can be heard.

Dated May 3, 1912.

THOMAS R. SHEPARD,
Defendant's Attorney. [16]

Service admitted May 3d, 1912.

T. P. GERAGHTY and
JOHN LYONS and
E. E. RITCHIE,
Plaintiff's Attorneys.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. May 4, 1912. Ed M. Lakin, Clerk. By Thos. S. Scott, Deputy. [17]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 555.

E. E. RITCHIE,

Plaintiff,

vs.

CHOEMON KIKUCHI,

Defendant.

Affidavit for Continuance.

United States of America,
District of Alaska,—ss.

Thomas R. Shepard, being sworn, says: I am the attorney of record for the defendant in this action, and make this affidavit in his behalf, to obtain a postponement of the trial herein, which is set down for the 9th inst. It is essential to the proper presentation of the defendant's case on the trial herein that the testimony of Matsutaro Numazaki, the defendant's agent who signed for him the contract in suit herein, and who is a resident of Miyako, Japan, and at present in Japan, be taken in Japan by deposition, to be read in evidence on said trial.

Said witness as I am informed and believe, will testify in denial and contradiction of the allegations of the plaintiff's amended complaint to the effect that after this court had entered a decree of forfeiture in the libel proceeding therein referred to he, defendant's said agent, conferred and advised with the plaintiff concerning the steps necessary to perfect an appeal from said decree, with the understanding

with plaintiff that he should represent defendant's interests in such appeal, and he will [18] testify to the effect that he, said witness, did not (as is alleged in said amended complaint) take away from Valdez when he left there after said trial, any papers of the plaintiff and did not consult with the plaintiff after said trial at all except about some incidental matters relating to said trial, but was taken away from Valdez in custody of the United States Marshal almost immediately after said trial was ended. Said testimony is material and important to the maintenance of the defense herein, and the defendant cannot prove said facts except by the testimony of said witness, who is therefore a material and necessary witness, in his behalf herein and without his deposition the defendant cannot safely proceed to trial herein.

The defendant's counsel in Seattle, Washington, James Kiefer (under employment by whom I am defending this cause) as I am informed in a letter this day received from him and as I believe has used due diligence to procure the deposition of said witness, promptly upon the joining of issue herein (which was not joined until within the past two weeks) by writing to Japan to arrange for the taking of his deposition, and if a continuance of the trial herein the next term of this court to be held at Valdez, which is to begin on June 24th, shall be granted, I shall take steps immediately for the issuance of a commission to take such deposition, and I verily believe that if such a continuance shall be granted such deposition can be taken and returned into this court in time to be used

in evidence at a trial herein during said next term; and said continuance is not sought for the purpose of delay.

The defendant's said counsel at Seattle has fully and fairly stated the facts in this case to me as the defendant's attorney herein, and after such statement I have advised the defendant, through his said counsel, and I verily believe, that the defendant has a good, full, perfect and [19] complete defense upon the merits to the plaintiff's alleged cause of action set forth in the *amended herein*, and to the whole thereof.

THOMAS R. SHEPARD.

Subscribed and sworn to before me this 3d day of May, 1912.

[Seal]

EDMUND SMITH,

Notary Public in and for the District of Alaska,
Residing at Valdez.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. May 4, 1912. Ed. M. Lakin, Clerk. By Thos. S. Scott, Deputy. [20]

*In the District Court for the Territory of Alaska,
Third Division.*

General March, 1912, Term—May 4th—36th Court
Day.

No. 555—Clerk's Memorandum of Minute.

E. E. RITCHIE,

Plaintiff,

vs.

CHOEMON KIKUCHI,

Defendant.

Order Denying Motion for Continuance.

Entered in Journal No. 6, page No. 780.

This matter coming on to be heard upon defendant's motion for a continuance of the trial of the above-entitled cause and the affidavits in support thereof, John Lyons and T. P. Geraghty appearing as attorneys for plaintiff; Thos. R. Shepard appearing as attorney for defendant, and after arguments had and the Court being fully advised in the premises,—

IT IS ORDERED that said motion be and the same is hereby denied. [21]

Filed in the District Court, Territory of Alaska,
Third Division, Jun. 22, 1912. Ed M. Lakin, Clerk.
By V. A. Paine, Deputy.

*In the District Court for the Territory of Alaska,
Third Division.*

No. 555.

E. E. RITCHIE,

Plaintiff,

vs.

CHOEMON KIKUCHI,

Defendant.

Bill of Exceptions.

BE IT REMEMBERED, That the above-entitled cause came on duly and regularly to be heard at Valdez, Alaska, on Thursday, the 9th day of May, 1912, before the Honorable EDWARD E. CUSHMAN, Judge of said court, and a jury:

The plaintiff herein being represented by his attorneys and counsel John Lyons, Esq., and Thomas P. Geraghty, Esq.;

The defendant herein being represented by his attorney and counsel Thomas R. Shepard, Esq.;

Opening statements were made to the Court and jury on behalf of the plaintiff by Judge Lyons and on behalf of the defendant by Judge Shepard:

WHEREUPON the following additional proceedings were had: [22]

[Testimony of E. E. Ritchie, the Plaintiff, in His Own Behalf.]

E. E. RITCHIE, the plaintiff, called and sworn as a witness in his own behalf, testified as follows:

Direct Examination.

(By Judge LYONS.)

Q. What is your name and occupation?

A. E. E. Ritchie; I am a lawyer.

Q. How long have you been engaged in the law business?

A. I practiced law about eleven or twelve years in the states and five years in Alaska; a little over five years.

Q. How much of that time have you practiced law in the town of Valdez, Alaska?

A. A little over four years.

Q. Do you know one Matsutaro Numazaki?

A. I do.

Q. Tell the jury who he is.

A. Matsutaro Numazaki was the master of the Japanese schooner "Tokai Maru."

Q. What was the "Tokai Maru"?

(Testimony of E. E. Ritchie.)

A. The "Tokai Maru" was a Japanese sealing schooner that was seized by a United States revenue cutter in the summer of 1910 for alleged violation of the alien fishing law of the United States, which is a law forbidding foreigners to fish in Alaskan waters; it was seized at Unalaska.

Q. When did you become acquainted with this man Matsutaro Numazaki? A. In October, 1910.

Q. Did you have any business dealings with this gentleman at that time?

A. Yes—the captain and crew, thirty-eight in number, of the "Tokai Maru" had been found guilty by the commissioner and ex-officio justice of the peace at Unalaska for violation of this [24] law and sentenced to the payment of five hundred dollars fine, which they had to serve out at two dollars a day under the statute. They were brought on here by the United States Marshal of Unalaska some time in October, 1910, and when they were confined over in the Whalen Building on McKinley Street as a temporary jail I was called in to see the captain, who wanted to employ an attorney.

Q. Did you go to see him?

A. I went to see him—I couldn't remember the exact date, but I should imagine it was a week and it may have been two weeks before the date of this contract, which is November 12, 1910—it may have been three weeks. I went to see him two or three or four times and talked to him through an interpreter, whose name is signed to this contract as a witness, W. Kino, a member of his crew who could

(Testimony of E. E. Ritchie.)

speak very good English. I talked to him several times and after we had arrived at an agreement as to the contract, I drew up this memorandum and took it over to him and it was read to him by the interpreter W. Kino and we signed it.

Q. I will ask you what that is.

A. This is the original contract—the captain's signature is in Japanese; he didn't write English.

Q. Did you sign that contract?

A. I signed that contract—that is my signature.

Q. Did the Japanese gentleman sign that too?

A. He signed that in my presence.

Q. This is the contract that was entered into between you? A. That is the original contract.

Judge LYONS.—We now offer this in evidence.

Judge SHEPARD.—I make a formal objection to the introduction of [25] this contract in evidence upon the ground that it is a variance from the statement of its nature in the body of the amended complaint.

By the COURT.—The objection will be overruled. There was a copy of the contract attached to the amended complaint. If there is any contradiction between the two it would not be considered a variance because it could not mislead the defendant.

Mr. SHEPARD.—That is, the exhibit, as attached as a part of the complaint, would control?

By the COURT.—It would control.

(The contract is admitted in evidence, marked Plaintiff's Exhibit "A," and read by the witness, as follows:)

Mr. RITCHIE.—This is the same contract that Judge Lyons read in his opening statement. It is on my letter-head, and reads:

[Plaintiff's Exhibit "A."]

Valdez, Alaska, November 12, 1910.

Matsutaro Numazaki, master of the schooner Tokai Maru, seized by United States officers as forfeited for violation of the alien fishing law of the United States, hereby retains E. E. Ritchie as proctor and attorney for said schooner and her captain, officers and crew, in all matters arising out of the alleged law violation.

The said E. E. Ritchie agrees to appear as proctor in admiralty to resist the forfeiture of said schooner, in the district court of Alaska. He also agrees to undertake to secure the discharge from further imprisonment of said captain and crew, now confined in the federal jail at Valdez, Alaska, under an alleged conviction and commitment for violation of said fishing law. For the foregoing services it is agreed that said Ritchie is to receive the following compensation:

If the said captain and crew are obliged to serve out their time and the release of said schooner is secured in the district [26] court of Alaska on payment of the fine of five hundred dollars and costs, the said attorney is to receive one thousand dollars (\$1,000) American money. If the discharge of said captain and crew is secured before the expiration of their sentences and the entire prosecution and forfeiture abandoned and said schooner released without fine, said attorney is to receive fifteen

(Testimony of E. E. Ritchie.)

hundred dollars, American money, and the \$245. already deposited for costs. If the forfeiture case goes to the Appellate Courts said attorney is to receive such further compensation as may be agreed on with the owner.

(Signed)

E. E. RITCHIE,

and the captain's signature in Japanese.

Witness, W. KINO.

Q. What did you do under that contract?

A. The first thing I did was to get a couple of friends of mine to sign a stipulation for costs in the sum of two hundred and fifty dollars. By the admiralty rule of federal courts, that is the first thing to do in an admiralty case. Before I was retained, on account of no appearance having been made, a default had been entered in the District Court here in the early part of September, and the testimony of the Government witnesses, the officers of the Revenue Cutter, Captain Haake and others, had been taken.

Judge SHEPARD.—I could object to any of this evidence on the ground that it is a matter of record and the record is the best evidence. I don't care to do that—with this understanding, that as the plaintiff is familiar with these proceedings he may detail them as though it were equal to the best evidence, subject to correction in case I wish to introduce the records. It is not, as a matter of fact, competent.

Mr. RITCHIE.—The printed record is on the table—the printed record [27] in the Circuit Court of Appeals is there.

(Testimony of E. E. Ritchie.)

By the COURT.—I understand it is stipulated now between counsel that in case Mr. Shepard wishes to qualify any of this witness' testimony by the record he can do so.

The WITNESS.—(Continuing.) As the printed record will show, that was in the early part of September. At the time I was retained there was no court in session, and the next term of court opened at Cordova on the 15th of November. Shortly after that I filed a motion, supported by an affidavit, to set aside the default already entered, and after argument Judge Cushman granted an order allowing the default to be reopened, upon the stipulation that we should plead at once to the merits, which was done. I then filed the answer to the amended libel of the district attorney and the claim of ownership for the defendant in this case, the owner of the schooner, Choemon Kikuchi. The case went over until December, after the court and all of us had returned to Valdez, to get certain evidence. The evidence was taken, part of it, I believe, in December, then the case went over until, I think, about the 23d or 24th of January, 1911. The case was then tried before Judge Cushman in this room, I appearing for the claimant; tried partly upon depositions—no, not upon depositions, but upon testimony taken before Mr. Hamburger as referee at different times. That was read before the Court and there was a little verbal testimony; two or three witnesses got on the stand and testified to minor matters here. The result of it was the trial court,

(Testimony of E. E. Ritchie.)

the instance court, as it is known in admiralty, decreed a forfeiture of the schooner, and held that the aggregate fine of \$19,000 inflicted by the justice's court at Unalaska upon the captain and members of the crew was a lien upon the schooner, which is [28] fixed by statute, and the Court further found the schooner liable to a fine of \$500. That was under the amended libel filed by the district attorney—made all those fines and costs a lien against the schooner. The date of the final decree, I believe, was the 2d of February, 1911. During the trial or before the trial, which was postponed a week or two, a certain Japanese agent came up here representing the owner; his name is Okajima. He speaks English very well and he is a very intelligent man, had been for several years an interpreter for the Immigration office at Seattle and the year before that had been employed here as an interpreter in Japanese cases in this court. Mr. Okajima appeared here to assist in looking after the case for the Japanese owner, at least he so stated; and after the case was finished and the decree entered for the forfeiture of the schooner to collect these fines through the lien, I talked several times to Okajima and probably two or three times to the captain, with Kino as interpreter. It was agreed that the case should be appealed, and I was to go through with it under my contract.

Q. What was the value of the property involved in this matter?

A. I only know that by the statements made to

(Testimony of E. E. Ritchie.)

me by the captain and Kino and others.

Q. What did they say?

A. They told me the schooner was worth \$12,000, American money—it cost \$25,000 Japanese when it was built a year or two, or three or four, before.

Q. Was there a cargo on the schooner?

A. Yes, there was the usual equipment on a sealing schooner, a small boat, guns and provisions and other supplies, and 116 sealskins—that appears in the record—of which 96 were good [29] fur sealskins, so I am told by Mr. Hastings; three were hair skins and 17 were pup skins.

Q. What was the value of those?

A. They have sold at these sales—Mr. Goshaw will testify to that after a while—they have sold at these sales at various figures running from 22 to \$33, I believe. Their usual value anywhere between Unalaska and Victoria, I believe, at that time was 25 to \$30.

Q. You were employed to protect property to the value of some 16 to \$18,000 for the fees set out in this contract?

A. That was the valuation put upon it by the captain and Kino, the only member of the crew that could talk English.

Q. How long were you engaged in the trial of this case?

A. Well, on this branch of the case, we had, of course, a discussion and argument of some length before Judge Cushman at Cordova over the matter of opening the default. Then they took the testimony

(Testimony of E. E. Ritchie.)

before Mr. Hamburger in December down in the District Attorney's office, Mr. Brubaker appearing for the Government. I suppose we put in a couple of hours at that argument; there were several witnesses—I believe that was two days; and then it came up on motion two or three times on some legal point in the court, and then we had a hearing one afternoon in this room before Judge Cushman,—I think it took pretty much the whole afternoon, including the argument. At that time all of the testimony taken before Mr. Hamburger as referee was read, and the captain was put on, I think possibly one other witness to testify to small matters—it all appears in the record there.

Q. Was there any other attorney employed in the case but yourself? A. No one at any time.

Q. How many of these Japanese gentlemen were there? [30]

A. There were thirty-eight members of the crew, including the captain.

Q. And you were supposed to be the guardian of the whole bunch?

A. Yes, I represented them in all matters—of course, the matter of trying to get them out on *habeas corpus* failed, and there is no claim made on that.

Q. Why wasn't the exact amount of your fees fixed for your services in the Appellate Court, in case the case went to the Appellate Court?

A. I explained to the captain at a great deal of length what was necessary to do for the trial of the

(Testimony of E. E. Ritchie.)

case and also the possibility that it might be decided adversely to us in this court.

Mr. SHEPARD.—Before the contract was signed?

Mr. RITCHIE.—Yes, before the contract was signed and at the time.

Judge SHEPARD.—We object to these matters leading up to this contract.

By the COURT.—You are not undertaking to contradict or vary any of the terms of this contract?

Mr. RITCHIE.—No, sir.

(Objection overruled. To which ruling of the Court counsel for defendant excepts; exception allowed.)

The WITNESS.—(Continuing.) The captain, of course, knew nothing about American courts. I explained to him what procedure would be necessary in the court here. I also explained that, under our American system, the decision might be against us in this court but that there was another court, an Appellate Court, to which we could take the case and have another trial at it and that was the reason the agreement was positively for so much money in this court, because I could tell him just what should be done there. I explained to him that I couldn't [31] tell very well how much work might be done in the Appellate Court on account of the possibilities of a rehearing or an attempt to take it to the Supreme Court of the United States, or something of that kind,—that that was uncertain. There was also another reason which had very much to do with it—the captain thought that the fee was a little high

(Testimony of E. E. Ritchie.)

compared with Japanese figures, and so I told him that I would leave the amount that I would receive in the Appellate Court, if we had to go up there, to subsequent agreement, because it was a question we might never reach—if we succeeded in this court we wouldn't be bothered about that question, and if we did have to go to the Appellate Court, we could decide what would be a reasonable compensation for the services after they were performed—that is the reason that part of it was left uncertain.

Q. Have you been paid anything at all by these parties for your services?

A. I was paid \$245, that is, \$500 Japanese money, for which I received \$245 at the bank here, and I paid out between \$45 and \$50—I am not quite certain of the exact amount—for costs for the captain in trying to get the *habeas corpus*, and getting the record from Unalaska—it was necessary to send some telegrams; the costs was a little over \$45 and I just charged them up \$45 costs.

Q. You have not been paid anything under the contract? A. Well, the remaining \$200 I received.

Q. What did you do after the case was tried here?

A. After the decree was entered up, as I was starting to say a while ago, I talked several days to Okajima, the Japanese agent, and the distinct understanding was that I was to take the case up on appeal, pursuant to my written contract; there [32] was no dispute about that, but I told Mr. Okajima that if he had any doubt as to my ability, or its being advisable for me to try to carry it through alone, as we

(Testimony of E. E. Ritchie.)

had lost it in this court, and he desired to get somebody outside, it was entirely agreeable to me for him to do so, except I wanted to have some choice in naming the man. I told him, though, that if he would pick out any well-known and reputable attorney—

Judge SHEPARD.—We object to this testimony—statements of this plaintiff to a person, a stranger to the action, whose relation of agency to the opposite party he has not established. Objection sustained at this time.

Q. Did you perform any services after the decree was entered up here?

A. Nothing except to answer two telegrams from the Japanese consul and to advise with the captain and Mr. Okajima separately and together as to the steps necessary to be taken. I also delivered all or nearly all of my office files in the case to Mr. Okajima, to be taken outside and delivered to Potter Charles Sullivan of Seattle.

Q. What did those files consist of?

A. Copies of the pleadings of both parties, copies, served upon me by the district attorney of the different papers that were filed after I came into the case, motions and notices—I guess the amended libel was filed before I came in, but I had gotten a copy of that; a copy of the decree and affidavits, all of those papers, files in the case, that are furnished to an attorney.

Q. Did you furnish those copies of all these records? A. I gave them to Okajima. [33]

Q. Did you have any telegrams from Seattle—you

(Testimony of E. E. Ritchie.)

stated you had—after the decree was entered up, with reference to this case? A. Yes.

Q. Tell the jury what those are. (Handing witness papers.)

A. These are some copies of the messages I sent.

Q. Where are the originals?

A. The originals are in the cable office—the originals to which these were answers I have somewhere in my office, but before starting over here, just before two o'clock, I couldn't find them; I had them in court one day—we can bring the originals of course from the cable office.

Judge SHEPARD.—Here is the sheet you served upon me, and I will admit, subject to the objection I am about to make, that the telegrams shown on this sheet were received by you through the cable office, from the Japanese consul in one case and consul in the other, and the telegrams shown were sent in reply; but I object to these telegrams on the same ground on which I objected to any statements to Okajima. These telegrams are signed “Japanese Consul” in one case and “Consul” in the other—I am not aware of any law by which the vice-consul or consul at Seattle can be said to stand in the position of agency toward this defendant, so that this defendant will be bound to pay for the trouble taken by Mr. Ritchie in replying to telegrams sent by the consul. * * *

By the COURT.—The evidence is admissible to show Mr. Ritchie's willingness to do all he could on this deal. The jury will understand that unless it

(Testimony of E. E. Ritchie.)

is shown by some other evidence that the consul was acting for the defendant, that so far as the value of the services themselves are concerned in sending telegrams that that will not be chargeable to the defendant; but [34] it goes to the matter of Mr. Ritchie's willingness to carry out his contract.

(Objection overruled, and defendant allowed an exception.)

Judge SHEPARD.—I will hand you this to offer in evidence in view of your lost originals, as copies of the originals.

By the COURT.—It will be admitted for the purpose stated.

(It is marked Plaintiff's Exhibit "B," and reads as follows:)

[Plaintiff's Exhibit "B."]

Seattle Feby 8, '11.

E. E. Ritchie, Valdez.

Cable date final decree Tokai Maru and estimate typewritten pages record on appeal.

JAPANESE CONSUL.

(Answer:)

Valdez Feb 8—

Japanese Consul, Seattle.

Decree February second. Record should not exceed hundred pages probably less.

E. E. RITCHIE.

Collect.

(Testimony of E. E. Ritchie.)

Seattle, Mar 3, '11.

E. E. Ritchie, Valdez.

Re your letter Feb fifteenth Dora reached Unalaska March twenty fourth Wish you argue Marshal to postpone date of sale and cable.

CONSUL.

(Answer:)

Valdez March 8—

Japanese Consul, Seattle.

Marshal says sale be postponed until Dora arrives Unalaska sailing from Seward about March seventeen. Remain Unalaska until after sale.

Collect.

E. E. RITCHIE.

Q. Did you try the case in the Circuit Court of Appeals? A. I did not. [35]

Q. For what reason?

A. Because the case had been taken entirely out of my hands by the Japanese in Seattle and Mr. Kiefer.

Q. Were you always willing to proceed with the case?

A. I was—I was in San Francisco a few days before the case came up, on another case at the same term. I was in San Francisco until about three or four days before it was heard, on another case.

Q. Were you notified that your services were no longer needed in this case?

A. Not until about two months afterwards, when I wrote to the Japanese consul asking if it was intended to dispose of me entirely. He wrote a brief answer saying that the captain would write to me and

(Testimony of E. E. Ritchie.)

I received a letter signed by the captain's name in English—he didn't write English and he couldn't have signed it. It was a typewritten letter, saying that they had simply seen fit—

Q. I will ask you if this is the letter. (Handing witness paper.)

A. That is the letter. This is the only notification I ever received and I don't know whom that came from, but I can surmise.

(The letter is received in evidence without objection and is marked Plaintiff's Exhibit "C.")

The WITNESS.—All I know about this is that I received it through the mails. I will read it (Exhibit "C").

[Plaintiff's Exhibit "C."]

Seattle, Washington, March 21, 1911.

E. E. Ritchie, Esq., Valdez, Alaska.

Dear Sir:—Your letter of March 8th to the Japanese Consul, of this city, has been handed to me. I do not see that you have any cause for complaint. My agent whom I sent out here did not see fit to retain Mr. Sullivan on the appeal for reasons which appeared to him fully satisfactory. [36] Referring to our contract of November 12th, 1910, I would say that your contract is to appear in the District Court and if you will examine the closing paragraph of the contract, you will see that the matter of appeal is to be subject to future contract or arrangement. No provision is made, as I read the contract, for your employment on appeal except by a further agreement.

(Testimony of E. E. Ritchie.)

The expense of having you come out to San Francisco to attend this appeal would be prohibitive.

I am sorry that you feel about the matter as you do but I do not see that you have any cause to complain. You did your best in the Trial Court, and the Court ruled against you. The owners have employed such counsel as they saw fit, and I do not see that you have any claim on them for compensation. Your agreement in the lower Court was contingent. You failed, and I do not see that they owe you anything. We will endeavor to take care of the appeal and win, if possible.

So far as the matter of costs is concerned, the costs will undoubtedly be paid out of the proceeds of sale and you will not be held on your cost bond.

Yours truly,

M. NUMASAKI.

It is signed in English—he didn't write English, so someone else must have signed that.

Q. That was the man you made the contract with originally? A. Yes, sir, that is, the captain.

Q. Now, at the time that you received this letter, where was the case at that time, what steps had been taken toward taking the appeal?

A. Mr. Kiefer had sent up the notice of appeal and the assignments of error.

Q. Since that time you have not done anything in the case? [37]

A. No, I have not done anything.

By the COURT.—Who presented the assignments in court, here?

(Testimony of E. E. Ritchie.)

A. I don't think there was any personal appearance. No local attorney was ever retained in the case.

Q. The assignments of error were signed in Seattle?

A. This is the complete printed record on appeal. Up to page 101 my name appears all the way through as proctor for the claimant. Beginning on page 102 is the Notice of Appeal, signed by James Kiefer, proctor for claimant and appellant. Service of the foregoing Notice of Appeal is this 2d day of March, 1911, hereby admitted. George R. Walker, U. S. Attorney for the Third District of the Territory or District of Alaska. Then comes the assignment of errors on the next page. There are seven assignments of error, signed by James Kiefer, proctor for claimant and appellant. I never received any communication from Kiefer or anybody connected with it except the brief note from the Japanese consul saying that the captain would write to me and that letter which the captain wrote; and I would like to state a few things that I think have been omitted as to Mr. Okajima's agency. The captain told me that Mr. Okajima was his agent and the owner's agent and authorized to act for him, and we talked together, all three of us, repeatedly. Mr. Okajima did most of the business, but he would talk from time to time to the captain and ask him questions; but the captain told me—that is, through the interpreter, of course I couldn't understand Japanese; but when Okajima came here, he came to my office and I took him to the captain and we talked together, I sup-

(Testimony of E. E. Ritchie.)

pose nearly a dozen times, all three of us, and I had other conversations with Okajima, but I had the captain's word for it as far as it could be translated [38] that Okajima was the agent of the owner and the agent of himself, whatever he did was all right. As to the statement in that letter that the cost of sending me to San Francisco was prohibitive—I explained to the captain through the interpreter and the supposed agent that I was going to San Francisco on another case which would come up at the same term, the May term of court of the Court of Appeals at San Francisco, and I wouldn't charge them anything for traveling expense, because I was going down anyway.

Q. Were you down below later on, at the trial of some other case?

A. The Phillips case in which I appeared was set for the 15th of May; I reached San Francisco the night of the 11th and remained until the night of the 17th—took part in the argument of the Phillips case on the 15th. This case, as the records show, was argued on the 23d, and was so set down in the calendar. I left six days before it was set down—of course I would have remained if I had been in the case.

Q. State what that book is.

A. This is the complete record, the complete printed record on the appeal. The case goes to the Appellate Court on all the pleadings, motions,—everything,—the orders of the court, decrees, transcript of the testimony, everything of the kind; a copy of

(Testimony of E. E. Ritchie.)

that record is typewritten by the clerk of this court and sent to the clerk of the Circuit Court of Appeals in San Francisco and under the rules of the Circuit Court it is printed in this form, and this is the complete record on appeal in the Circuit Court of Appeals. This is Number 1969—in an admiralty case the record is called Apostles—that is an old admiralty term.

(The printed record is offered in evidence.) [39]

Judge SHEPARD.—I make no objection to the offer, but I would suggest, in case of an appeal by either party to this action, we should endeavor to agree on a summary of its contents.

Judge LYONS.—Yes, or put in the original book.

(With this understanding the book is admitted in evidence as Plaintiff's Exhibit "D," is attached hereto and made a part hereof.)

Q. Is there anything else you wish to say? I will ask you first, after the trial of the case here where did these Japanese representatives in Seattle procure the copies of the records?

A. I don't think it was possible for them to get any except those that I gave them, for the reason that the notice of appeal and the assignment of errors from Kiefer came back, I think, on the first boat, if not on the first, on the second boat.

Q. So far as you know, they never procured them from the clerk's office, but used yours?

A. They couldn't have had anything in Seattle except mine, unless they got them from the clerk's office here. As all lawyers know, the only copies

(Testimony of E. E. Ritchie.)

would be mine, those in the clerk's office and the District Attorney's office. They must have got them either from me, from the District Attorney or the clerk's office, and they certainly got mine. They couldn't have prepared the assignment of errors without those copies, because they had nothing to go by. I would add that, in my opinion as a lawyer, the fee is reasonable in the case.

Q. What do you consider your services worth?

A. For the whole case, if I had gone through with it, it would have been worth two thousand dollars, a thousand dollars in [40] each court, and I agreed with them that I would not charge them any traveling expense because I was going to San Francisco anyway.

Judge LYONS.—That is all.

(By the COURT.)

Q. A thousand dollars in the Circuit Court of Appeals?

A. A thousand dollars in the Circuit Court of Appeals.

Q. And you were not to charge anything for your traveling expenses?

A. No, because I was going anyway—my work in each court I consider worth a thousand dollars.

Cross-examination.

(By Judge SHEPARD.)

Q. This case in which you were employed originated by the seizure by the marshal, or deputy collector, of the ship in Unalaska, or close to Unalaska?

A. Seizure by United States revenue cutter.

(Testimony of E. E. Ritchie.)

Q. And then the captain and crew, consisting of thirty-eight persons in all, were brought up before the commissioner and fined \$500 apiece?

A. Yes, sir.

Q. This made a total of \$19,000? A. Yes, sir.

Q. Up to that time there was nothing against the vessel, either the \$19,000 or anything else, but she was seized in anticipation of proceedings against her?

A. That is right.

Q. And then the men were brought here, as they didn't have money to pay their fines, and put in jail?

A. They were kept in jail for three months at Unalaska and then brought here.

Q. It took considerable more time to work out their sentences at [41] two dollars a day?

A. It took 250 days; yes, sir.

Q. And they were brought here to put in the rest of their time? A. Yes.

Q. Now, after they got here, proceedings were instituted in this court against the ship?

A. Yes, sir.

Q. And this court in those proceedings entered a default before you were employed?

A. Yes, that was done early in September.

Q. In the early part of your testimony in chief you stated that the seizure was in October.

A. You are mistaken—the seizure was the 28th of June; the record will show that.

Q. The captain in jail sent for you, at somebody's suggestion, I suppose? A. Yes, sir.

Q. And you went there and talked to him through

(Testimony of E. E. Ritchie.)

an interpreter—not Okajima, but some other interpreter who was already here?

A. Okajima didn't come until the 23d day of January.

Q. You talked through some other interpreter?

A. One of the crew, W. Kino.

Q. The captain did not then or at any time while he was communicating with you talk or understand any English himself, but communicated with you through an interpreter? A. Always.

Q. (By the COURT.) Who selected the interpreter?

A. I suppose the captain did—Kino was the only one he could get who understood both English and Japanese.

Q. And everything was signed by you and the captain while he was [42] still confined in jail?

A. Yes, sir.

Q. And then you took the proceedings to open the default? A. Yes.

Q. You received about that time when the contract was signed the \$245, the Japanese money from which you realized the \$245, did you?

A. Yes, a day or two before the contract was signed.

Q. And the stipulation for costs which was necessary as a part of your appearance, that was a stipulation in the sum of \$200, was it not,—the usual sum?

A. Two hundred and fifty dollars.

Q. You instituted the proceedings to open the default, and got that default opened? A. Yes, sir.

Q. And then you put in your answer and conducted

(Testimony of E. E. Ritchie.)

the defense,—the hearing before the referee and the argument before the judge, and perhaps additional testimony taken before the judge? A. Yes.

Q. And about the same time you instituted *habeas corpus* proceedings and tested the legality of the fines before the commissioner?

A. Yes, sir, that was at Cordova.

Q. You were unsuccessful in that part of it—the court discharged the writ of *habeas corpus* and held their detention at Unalaska legal, and they served out their time of 250 days? A. Yes.

Q. And then, in the proceeding in which the default had been entered—no final decree as to how much the ship was liable for appeared in the case, only an order of default? [43]

A. That is all.

Q. And as a final result in this court of your efforts in pursuance of that contract, after the testimony was taken and the hearing had before Judge Cushman, Judge Cushman decided, and entered a decree accordingly, that the ship should be fined and he entered a fine against it of \$500, and also adjudged a lien against the ship to the amount of \$19,000, the fines of the captain and crew?

A. Yes, the record so shows.

Q. That, speaking for the information of the jury, without reference to the record, that is the sum and substance of the decision? A. That is correct.

Q. In so far as the District Court services are concerned, you did not, then, up to the conclusion of the District Court proceedings and the entry of the de-

(Testimony of E. E. Ritchie.)

eree, under the terms of your contract, you did not earn, become entitled to, anything? A. No.

Q. And if there had been no appeal prosecuted from either of those decisions would you have been entitled to anything, as you construe the contract?

A. I would not.

Q. You would even have been bound to repay the unexpended balance of the fund that was given you for disbursements? A. No.

Q. It was understood you were to have that anyway?

A. Yes, in any case I was to keep that, what I didn't expend for costs.

Q. Was an appeal ever prosecuted from this court to the Circuit Court of Appeals or to any other Appellate Court from the decision of Judge Cushman or this court on the *habeas corpus* proceedings? [44]

A. No.

Q. And the men served out their time?

A. Yes, sir.

Q. And when did that 250 days expire?

A. About the 9th of February—the men were started outside two or three days before their term expired because they wanted to take them on a certain boat. They were taken out about the 6th or 7th of February.

Q. Speaking from memory, without reference to the record, if you can, what was the date of Judge Cushman's decree fining the ship and extending the men's fines against the ship?

A. The decree was filed on the second of Febru-

(Testimony of E. E. Ritchie.)

ary; I think it was rendered a day or two before.

Q. Then it was only about a week after the decree was entered that the men were started outside?

A. Within a few days.

Q. From the second to the ninth?

A. Somewhere along there.

Q. They started outside on the ninth and that was two or three days before their term expired?

A. No; they started out about the 6th or 7th and the expiration was the ninth.

Q. And was the decree or order denying and discharging the writ of *habeas corpus* that you had sued out to get the captain and crew out of jail—that was entered earlier than the admiralty proceeding?

A. That was late in November, or about the first week in December, at Cordova.

Q. In fact, no more was ever done in that?

A. No. [45]

Q. During those two or three days that the master of the ship, the agent of the defendant in this case, remained here after the decree was entered, you say you had discussions with him and with the interpreter who came up here from Seattle, Mr. Okajima, relative to an appeal?

A. Two or three times a day.

Q. Every day for three or four days?

A. Yes, I don't remember that there was a day I didn't see them once, and I think some days I saw them three or four times.

Q. And you say during those discussions, after the District Court proceeding was completed by the entry

(Testimony of E. E. Ritchie.)

of the decree, it was agreed between you and the master of the vessel that you should have charge of the appeal?

A. It was distinctly agreed, that being the interpretation that we both put on the contract.

Q. You haven't sued on any such new agreement, you simply sue on the contract?

A. Suing for a breach of the contract.

Q. You named to them Potter Charles Sullivan, who is a member of the Seattle bar, as the attorney whom you desired them to associate with you in the appeal?

A. If we had any one; it was uncertain whether anybody should be taken in, because I explained I was going to San Francisco any way, but if they thought they would rather have another attorney in, it would be agreeable to me, in spite of my contract, that they should take him in, and I suggested Sullivan.

Q. Was there any new consideration passing between you and the defendant or any of his representatives, any consideration passing from you or to the defendant for this agreement or understanding, after the decree in the District Court was entered?

A. None except the time I spent talking to them and my office [46] files which I loaned to them to assist in getting up the appeal.

Q. Those office files consisted, in the first place, that is, consisted in part, of carbon copies of the papers you had prepared and filed in the defense against these proceedings? A. They did.

(Testimony of E. E. Ritchie.)

Q. And those carbon copies were simply carbon duplicates made when you were making the originals and the copies which it was necessary to serve?

A. Yes, and copies that were served by me on the district attorney.

Q. Do you claim, as to those carbon office copies, that they were your property—you made them for your use in the progress of the case,—in the conduct of the case?

A. The only thing necessary for me to prepare for my client was the copies I filed in court; if I saw fit to prepare other copies for my own use, that was my affair.

Q. You have not sued for the value of those papers?

A. The value of the papers was not the paper and the typewriting—they were very valuable for use in preparing the assignment of errors.

Q. How many papers were there that you had copies of, papers that originated on your side of those proceedings?

A. I couldn't say, because I gave them all of them.

Q. Whom did you give them to?

A. Mr. Okajima.

Q. Now, coming to the other sort of office copies, they were the copies served upon you of papers which had originated on the part of the Government in the proceedings? A. Yes.

Q. And been served upon you? [47] A. Yes.

Q. How many were there of those?

A. Possibly three or four; they were mostly motions.

(Testimony of E. E. Ritchie.)

Q. And those were served upon you as required in the practice of the court in connection with your work for your client? A. They were.

Q. Do you claim they were your property?

A. Under the statute I had a lien on them for my fees.

Q. Had you earned fees up to that time?

A. I earned fees by spending two or three days' time talking to those people.

Q. How much is your talk usually worth per minute or hour?

A. Sometimes it is not worth anything and sometimes I get considerable for it.

Q. Did Mr. Okajima take these copies of papers that were served upon you also, as well as your office copies?

A. Everything I had together, as a lawyer keeps them.

Q. Was there any original documents among the papers he took away?

A. I think not—any original documents, I think, were filed as exhibits in the case, and there were two or three letters in Japanese that were used as evidence.

Q. Did he ask you for those copies, or did you offer them to him, or how did he come to take them outside?

A. I couldn't state who spoke of it first, it is very likely I did; it is very likely it was on my suggestion.

Q. You said, you had better take those office copies outside?

(Testimony of E. E. Ritchie.)

A. I think very likely that is the case.

Q. Do you know why the people, whoever they were, representing the ship owner in this case, why they didn't go to Potter Charles Sullivan?

A. I know what they say about it; I can make a better guess than [48] that though.

Q. Don't you know the fact to be that it was because he was for a week on one of his occasional toots, and was not in condition to do business?

A. I only know that because you say you have a letter to that effect—I think the better reason is the kind of man Jim Kiefer is.

Q. You testified that your services going through the whole proceeding would have been worth two thousand dollars, did you not?

A. That is my opinion.

Q. You mean, irrespective of the result of the appellate proceedings? A. If we succeeded.

Q. If you had succeeded? A. Yes, sir.

Q. That is, if you had succeeded to such an extent as was contemplated in this contract to entitle you to a District Court fee? A. Yes, or practically so.

Q. Now, if there had not been any appeal and you had succeeded "practically so" in the District Court but had not succeeded *so*—you would not be entitled to a fee?

A. Yes, under a reasonable construction of the contract, if there had been a few dollars, more or less, I don't think it would affect my right to recover, on a *quantum meruit* at least.

Q. Suppose, Mr. Ritchie, that you had had charge

(Testimony of E. E. Ritchie.)

of the appeal, but had not succeeded any further than just as they did on the appeal as it was conducted, would you then have been entitled under your contract to anything for services in the District Court?

A. Not in the District Court; no.

Q. And in that event, how much do you consider that your services [49] on the appeal, prosecuting the appeal, not to a point of success to entitle you to District Court fees, but to such a point, to partial success as they prosecuted it—how much would they have been worth?

A. I don't think you put that question the way you started it.

Q. You mean you don't understand the question?

A. I think you started it on one tack—

Q. Well, suppose you had had charge of the appeal and had prosecuted it clear through and had attained the same degree and only the same degree of success that the attorneys who did prosecute it attained, that is, a degree of success falling short of what would entitle you to a fee in the District Court, what would your services then have been worth in the Appellate Court?

A. My services in the Appellate Court would have been a thousand dollars; that would have amounted to a winning in the District Court, and I would then have been entitled to the fee in that court.

Q. If you had not won any further than they won—you have just admitted that the appeal as it has been decided has not resulted in what would entitle you to fees in the District Court?

(Testimony of E. E. Ritchie.)

A. Practically so; they save all but \$500 of \$19,000 they expected to win on.

Q. In other words, you are entitled, you think, to consideration, though falling \$500 short?

A. I think we are entitled to a fee, unless you prorate it and cut it down that much—the \$500 imposed on the company is not what the contract contemplated.

Q. Supposing that the Japanese consul had any right to send you those telegrams, what value do you attach to your services in replying to them? [50]

A. Hardly anything—it was just an evidence of how the contract was regarded.

Q. This statement that you testified that the master of the ship who couldn't talk a word of English made, to the effect that the interpreter Okajima was an agent of the ship owner and was his agent—you say he was his own agent, the master's agent, or the agent of the ship owner?

A. Everything that the captain said to me was said through Okajima.

Q. Did he state, as Okajima interpreted it, that Okajima was the agent of him, the speaker, the master of the ship, or the agent of the owner of the ship?

A. He was the agent authorized to represent the captain and the schooner and all business connected with the schooner.

Q. That statement of the captain's came to you only through this man whom you claim was agent, this interpreter.

(Testimony of E. E. Ritchie.)

A. Excepting that he told me from the outset, saying that Okajima was coming up here—he told me that through Kino.

Q. He told you he had letters saying that Okajima was coming?

A. I think the record will show that I got a continuance of the case for a week, after the time it was set for hearing, upon my statement that the captain had told me that he had a letter that the Japanese agent was coming here and he didn't want the hearing to come off until the agent arrived. It was set for the 16th of January and was continued until the 23d to await the arrival of the Japanese agent, whom the captain told me was the agent of the Japanese owner.

Q. You plead in your amended complaint that you were ready and willing to perform services in the Appellate Court—did you ever communicate that readiness and willingness to the defendant [51] or anybody representing him?

A. I think only in the letter to the Japanese consul.

Q. The letter to which this letter from the Japanese consul is a reply? A. Yes, sir.

Q. Will you produce that letter of yours, or a copy of it, that you sent to the Japanese consul?

A. It may be some trouble for me to find the copy, and I am not sure that I have one—I looked for it some time ago and couldn't find it among my other papers.

Q. That letter to which this consul's letter in evidence is a reply is the only communication you ever made expressing your willingness and readiness to

(Testimony of E. E. Ritchie.)

serve on the appeal? A. After they left here, yes.
(By Judge LYONS.)

Q. I will ask you what was the result of this case on appeal in the Appellate Court?

Mr. SHEPARD.—We will accept that without objection, subject to correction by the decision in the Appellate Court.

A. The mandate will show that.

Witness excused. [52]

[Testimony of Charles G. Wolf, for Plaintiff.]

CHARLES G. WOLF, a witness called and sworn in behalf of the plaintiff, testified as follows:

Direct Examination.

(By Judge LYONS.)

Q. What is your name and occupation?

A. Charles G. Wolf; I am a jail guard.

Q. How long have you lived in Valdez, Alaska.

A. Thirteen years.

Q. Were you in Alaska along about the months of October and November, 1910? A. Yes.

Q. Did you hear a conversation which took place between Mr. Ritchie on one side and the captain of this schooner on the other, Captain Matsutaro Numazaki?

A. Why there was a third side to it—it all came through Kino; Kino was one of the hunters on the vessel, who had received an English education—I think he is a half-breed.

Q. Was he the interpreter?

A. Yes, he is an excellent interpreter.

(Testimony of Charles G. Wolf.)

Q. Did you hear a conversation related by the interpreter? A. Yes, a great many of them.

Q. State what that conversation was.

A. Which conversation?

Q. The one about this contract.

A. Why, the contract was brought in and it was read to Kino, and Kino translated it a little at a time, and, as I remember it, the thousand dollars kinder knocked him off his perch so to speak, he didn't like that thousand dollars.

Q. Who didn't like the thousand dollars?

A. The captain; and he said it probably was worth it and all [53] that, but he didn't want to have too big a fee put in there, that is in signing the contract; that is, he didn't want to bind the owners over his own name; and they backed and filled about it and finally they suggested that they could leave the fee a good deal to the Court, so as to make it safe for the captain—he was afraid to go back there if he contracted too big an account for the boat, and he wanted to have the fee fixed by the Court a good deal, as I remember it.

Q. That was with reference to the appeal?

A. With reference to the appeal? That was before any appeal was made.

Q. That talk was with reference to the appeal?

A. Yes, it was with reference to the appeal and the work in the case. Of course, the appeal came afterwards, this was along in the fall after they came—afterwards they had other conversations when we moved the Japs over to this jail here.

Witness excused. [54]

[Testimony of George R. Goshaw, for Plaintiff.]

GEORGE R. GOSHAW, a witness called and sworn in behalf of the plaintiff, testifies as follows:

Direct Examination.

(By Judge LYONS.)

Q. Will you tell the jury your name and occupation?

A. George R. Goshaw; Deputy United States Marshal.

Q. How long have you resided in the town of Valdez? A. Three years this next July.

Q. Are you familiar with a certain schooner known as the "Tokai Maru"?

A. I have been on such a schooner; that is in our custody at Unalaska.

Q. Do you know anything about the value of that schooner?

A. The only way I might arrive at a valuation of the schooner itself, outside of the cargo that it has on board, would be in comparison with other schooners I have sold under forced sale, under marshal's sale formerly—there were two other schooners seized by the revenue cutters for illegal sealing.

Q. You have sold several schooners of that kind?

A. I have sold two others.

Q. What, in your opinion, would be the value of this schooner?

A. Why in comparison with the other schooners, as I am informed—of the "Kinzie Maru," which was supposed to be of a value of \$15,000 and of this vessel, the "Tokai Maru," being built in 1904, a recent date,

(Testimony of George R. Goshaw.)

and showing no great hardship or usage, it might come to a valuation of from seven to ten thousand dollars, that is for those engaged in that business, that of sealing or fishing.

Q. Is there any provisions or other cargo aboard the ship?

A. The ship has all its tackle that is customary to use for that purpose, in sealing, and also a cargo of sealskins numbering [55] some ninety-six fur seals.

Q. Can you testify from your own knowledge the value of those skins?

A. I can testify that we have formerly sold skins from \$22 to \$33 at marshal's sale—at one time recently we had received \$22 for skins and at another time we received \$33, at marshal's sale.

(By Judge SHEPARD.)

Q. Have you ever seen these sealskins that Mr. Ritchie has attached in this case?

A. I have seen the sealskins that were seized on board that vessel.

Q. And those are the same ones that Mr. Ritchie attached for his fees in this case?

A. So I understand.

Q. And comparing those with others that you have stated have been sold at marshal's sale, are they as good?

A. At the time I saw them they were in the same condition as those I had sold on the former sale.

Q. It is a question of size and quality, as well as condition?

(Testimony of George R. Goshaw.)

A. They would be about the same value, in comparison with the other skins.

Witness excused. [56]

[Testimony of Thomas S. Scott, for Plaintiff.]

THOMAS S. SCOTT, a witness called and sworn in behalf of the plaintiff, testified as follows:

Direct Examination.

(By Judge LYONS.)

Q. What is your occupation?

A. Deputy clerk of the court.

Q. How long have you been employed in that business? A. Since May first, 1909.

Q. You were deputy clerk of the Court during the years 1910 and '11? A. Yes.

Q. I will ask you if you ever received any request to furnish papers, to furnish copies of the record in the case of the United States versus the schooner "Tokai Maru"? A. No, none.

Q. Did you ever receive any such request from Mr. Kiefer, an attorney in Seattle? A. No.

Q. Was there ever any copies furnished to any attorney? A. None that I know of.

Q. When did you receive the assignment of errors in that case?

A. I don't know just the exact date we received them, but I think it was along in March some time; we received them enclosed in a letter from Mr. Kiefer, dated February 24th, in which he enclosed notice of appeal, bond on appeal, assignment of errors, prae-cipe for transcript, and citations, and they were filed in the District Court on the second day of March.

(Testimony of Thomas S. Scott.)

Q. Who presented them to the Court?

A. I think they were presented by Mr. Lakin—I am quite sure they were.

Witness excused. [57]

[Testimony of Joseph H. Murray, for Plaintiff.]

JOSEPH H. MURRAY, a witness called and sworn in behalf of the plaintiff, testified as follows:

Direct Examination.

(By Judge LYONS.)

Q. What is your name and occupation?

A. Joseph H. Murray; attorney at law.

Q. How long have you been engaged in the practice of the law? A. Since September, 1900.

Q. How long have you been practicing in Alaska?

A. Off and on nine years—I have been in the interior during that time.

Q. You are now engaged actively in the practice of the law in Valdez—at the present time?

A. Yes, sir.

Q. Suppose in the District Court of Alaska a case was lost, covering property which was valued in the neighborhood of \$18,000, and the losing parties sought to and did take an appeal to the Circuit Court of Appeals at San Francisco, what would be the reasonable value of the services of an attorney for prosecuting that appeal?

A. To prosecute the appeal, without reference to what he did in the lower court?

Q. Without reference to what he did in the lower court.

(Testimony of Joseph H. Murray.)

A. And without reference to what the result of the appeal was?

Q. Well, yes. A. I should say about \$1,500.

Q. What would be the reasonable value of the services of an attorney for conducting the case in the lower court, namely in the District Court?

(Question objected to—objection sustained.)

Q. (By the COURT.) If another party was associated in the case on [58] appeal by the attorney originally employed to prosecute the appeal, how would you divide the amount?

A. If the attorney that tried the case associated another attorney with him?

Q. (By the COURT.) An outside attorney, I mean—say one in Seattle?

A. I had in mind the local attorney alone in my answer.

Witness excused.

[Testimony of T. J. Donohue, for Plaintiff.]

T. J. DONOHUE, a witness called and sworn in behalf of the plaintiff, testified as follows:

Direct Examination.

(By Judge LYONS.)

Q. What is your name and occupation?

A. T. J. Donohue; attorney.

Q. How long have you been engaged in the practice of the law? A. Since April, 1897.

Q. Have you been practicing in Alaska during a portion of that time? A. Yes, since July, 1898.

Q. Are you engaged in the active practice of the law at this time? A. Yes.

(Testimony of T. J. Donohue.)

Q. Where? A. Valdez.

Q. I will ask you this question: Suppose that a case in the District Court for the Territory of Alaska, Third Division, involving property which was of the value of about \$18,000, 16 to \$18,000 was lost in the District Court and the losing party appealed the case to the Circuit Court of Appeals of the Ninth Circuit at San Francisco, what would be the reasonable value of the services performed by an attorney at law [59] in prosecuting that appeal to its final determination?

A. Let me understand the question—do you not take into consideration the result of the appeal in the Circuit Court of Appeals? I ask the question for this reason: I usually base my charges of fees on three things—First, the amount involved; second, the result of the action, and third, the amount of work that I do, and professional services required in the transaction. Now, if it was a fee, with no stipulated price on it—well, I would consider, of course, if it was under a contract it would be a different proposition—

Q. Well, knowing the amount of property involved, what would you charge for a fee in case you succeeded?

Judge SHEPARD.—We object to the form of that question.

(Objection sustained.)

Q. There was a lien established on the property in the District Court wiping the property out, as much as the property was worth. In the Court of Appeals that lien was reduced to a thousand dollars.

A. With that condition I would consider \$1,500 a

(Testimony of Edmund Smith.)

very reasonable fee for the services in the appellate court.

Witness excused. [60]

[Testimony of Edmund Smith, for Plaintiff.]

EDMUND SMITH, a witness called and sworn in behalf of the plaintiff, testified as follows:

Direct Examination.

(By Judge LYONS.)

Q. What is your name and occupation?

A. Edmund Smith; attorney at law.

Q. How long have you been engaged in the practice of the law? A. Since 1890.

Q. What part of that time have you spent in Alaska?

A. Nine years this past March—a little over nine years.

Q. At what place in Alaska? A. Valdez.

Q. And you have been practicing law during that time? A. During all that time.

Q. Are you engaged in the active practice of the law now? A. I am.

Q. I will ask you, Mr. Smith, a hypothetical question. Suppose that a certain cause was being tried in the District Court for the Territory of Alaska, in the Third Division, covering property which was valued at from 16 to \$18,000, and the cause was lost in the District Court and appealed to the Circuit Court of Appeals for the Ninth Circuit, at San Francisco—what would be the reasonable value of the services performed by an attorney in prosecuting that appeal

(Testimony of Edmund Smith.)

and carrying it through to its final determination in the higher court?

A. I think it would depend somewhat on the result in the Court of Appeals.

Q. Suppose that you were successful in the Court of Appeals in winning the case, what, then, do you think would be the reasonable value of the services?

A. I think from \$1,500 to \$2,000, depending upon the amount of work involved, the number of questions involved on the appeal—from \$1,500 to \$2,000 would be a reasonable fee, depending upon [61] those circumstances.

Witness excused.

Judge SHEPARD.—I move to strike from the record and exclude from the jury's consideration the testimony of all these three witnesses last called on the question of value of services upon the ground that their testimony is irrelevant, having been called out by a hypothetical question not in accordance with the facts in this case and the value of the property involved as shown by the preceding testimony.

By the COURT.—The motion will be denied. There was no objection made to the questions when asked.

Whereupon Court adjourned until to-morrow (Friday) morning at 10 o'clock.

Friday, May 10, 1912.

[**Testimony of Thomas S. Scott, for Plaintiff,
(Recalled).**]

THOMAS S. SCOTT, recalled, as a witness in behalf of the plaintiff.

(By Judge LYONS.)

Q. You testified yesterday that you were the deputy in the clerk's office at Valdez. A. Yes, sir.

Q. I will ask you, what is that paper which you hold in your hand.

A. It is a mandate from the Circuit Court of Appeals in the appeal case taken to the Circuit Court of Appeals, entitled Choemon Kikuchi, Claimant, vs. The United States of America, being an appeal from this court, third division.

Judge LYONS.—I will introduce the mandate in evidence.

(The mandate is admitted in evidence, marked Plaintiff's Exhibit "E.")

(By Judge SHEPARD.) [62]

Q. A decree was entered at the foot of this mandate in obedience to it? A. There was; yes, sir.

Q. Do you know, and if so, state, whether that decree decreed a fine of \$500 against the vessel, a fine of \$500 against the captain and crew as a company and for costs, and declared that latter fine as well as the former fine a lien on the vessel, and provided for the sale of the vessel for the thousand dollars?

A. I couldn't state positively without seeing the decree.

Judge LYONS.—We would like to have Mr. Scott read the mandate.

By the COURT.—The clerk will read the mandate.

(The witness reads the mandate, Exhibit “E,” as follows:)

[Plaintiff's Exhibit “E.”]

“UNITED STATES OF AMERICA,—ss.

The President of the United States of America, to
The Honorable Judges of the District Court of
the United States for the Territory of Alaska,
Third Division, Greeting:

Whereas, lately in the District Court of the United States for the Territory of Alaska, Third Division, before you, or some of you, in a cause between United States of America, Libelant, and the Schooner ‘Tokai Maru,’ Her Tackle, Apparel, Furniture and Cargo, Respondent, and Choemon Kikuchi, Claimant, No. 477, a decree was duly filed and entered on the 2d day of February, A. D. 1911, in favor of the said libelant, and against the said respondent and claimant; which said decree is of record in said cause in the office of the clerk of the said District Court (to which record reference is hereby made and the same is hereby expressly made a part hereof),—

On Consideration Whereof, it is now here ordered, adjudged and decreed by this Court, that the decree of the said District Court in this cause be, and the same is hereby, reversed [63] and that this cause be, and hereby is remanded to the said District Court with directions to vacate the decree appealed from; to release the fur sealskins; and to enter a new decree for a fine of \$500 against the vessel, a fine of \$500

against her captain and crew as a company, and for costs; and to enforce such decree by appropriate proceedings.

September 5, 1911.

You, Therefore, are Hereby Commanded

That such further proceeding be had in the said cause in accordance with the opinion and decree of this Court, and as according to right and justice and the laws of the United States ought to be had, the said decree of said District Court notwithstanding.

WITNESS, the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the United States, the 2d day of November, in the year of our Lord one thousand nine hundred and eleven, and of the Independence of the United States of America the one hundred and thirty-sixth.

(Signed) F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit."

Judge SHEPARD.—I desire as part of the cross-examination of this witness to put in evidence the decree entered by your Honor at the foot of that mandate, when it is brought up.

By the COURT.—Very well.

Witness excused. [64]

[Testimony of E. E. Ritchie, for Plaintiff
(Recalled).]

E. E. RITCHIE, Recalled.
(By Judge LYONS.)

Q. I will ask you to explain to the jury as to whether or not a case appealed from the District Court of the Territory of Alaska has to be tried anew

(Testimony of E. E. Ritchie.)

in the Circuit Court of Appeals, or whether or not it is tried from the record which goes up from here and the law. Explain that to the jury.

A. A case in the Appellate Court is tried simply upon the record made in the court below. As I explained yesterday, here is the printed record of all the papers, all the pleadings in the case, motions, the orders of the court, the final decree and a transcript of the testimony. The only thing that the appellate Judges on appeal examine is the question whether there were errors of law,—that is, wrong rulings made by the Judge in the court below, and on that question the case stands or falls in the Appellate Court. This case, like every other case, was heard at San Francisco on the record made on the trial here, and not on anything new down there except the argument.

Q. So that the attorneys at San Francisco, that took up the case at that end, had nothing at all to do with it here?

A. No, and nothing at all to do with it down there except to argue it on the record made here—that is, the entire record of the case in this court.

Q. (By Judge SHEPARD.) In a case, a proceeding of this sort, a libel against a ship, new evidence can be adduced before that court?

A. Yes; it was not done in this instance but it can be under the admiralty rules.

Witness excused. [65]

[**Testimony of Thomas S. Scott, for Plaintiff
(Recalled).**]

THOMAS S. SCOTT, recalled.

(By Judge SHEPARD.)

Q. Have you the decree entered by this court at the foot of the mandate which you read?

A. Yes, sir.

Q. Is this the decree? A. Yes, sir.

(The decree is admitted in evidence, marked Plaintiff's Exhibit "F," and read to the jury by Judge Shepard as follows:)

[**Plaintiff's Exhibit "F."**]

*"In the District Court for the District of Alaska,
Division Number Three.*

No. 477.

UNITED STATES OF AMERICA,

Libellant,

vs.

Schooner 'TOKAI MARU,' Her Tackle, Apparel,
Furniture and Cargo,

Respondent,

and

CHOEMON KI KUCHI,

Claimant.

**Final Decree and Judgment Pursuant to Mandate
of Circuit Court of Appeals.**

Whereas, a final decree and judgment was duly entered and filed in the above-entitled Court in this cause on the 2d day of February, 1911, in favor of

the United States of America, libellant, and against the above-named respondent and claimant, adjudging and decreeing that said Schooner 'Tokai Maru' pay to the United States a fine of five hundred dollars; and that certain fines, mentioned in said judgment, amounting to nineteen thousand dollars, were liens against said vessel, her tackle, apparel, furniture and cargo, together with one hundred seventeen fur sealskins, constituting part of said cargo, be condemned and sold to satisfy said liens, amounting to nineteen thousand dollars, and the said fine of five hundred dollars imposed against said vessel; and,

Whereas, upon an appeal, prosecuted by said claimant, from the aforesaid decree to the Circuit Court of Appeals for the Ninth Circuit, a decree was duly entered in said Circuit Court of Appeals in said cause, on the 5th day of September, 1911, wherein it was ordered, adjudged and decreed that the aforesaid decree of the above-entitled District Court be reversed, and that said cause be remanded to the said District Court, with directions to vacate the decree appealed from, to release the fur sealskins, and to enter a new decree for a fine of five hundred dollars against said vessel, and a fine of five hundred dollars against her captain and crew as a company, and for the costs of this action;

Now, Therefore, pursuant to the opinion, decree and mandate of the said Circuit Court of Appeals it is hereby ordered, adjudged and decreed that the decree entered herein in the above-entitled [66] District Court on the 2d day of February, 1911, be, and the same is hereby, vacated;

And it is further ordered, adjudged and decreed that the fur sealskins mentioned in said decree be, and they are hereby, released;

And it is further ordered, adjudged and decreed that said schooner 'Tokai Maru' pay to the United States a fine of five hundred dollars and that the captain and crew of said 'Tokai Maru,' named in the amended libel of information herein, as a company, are liable for, and that they pay a fine of five hundred dollars to the United States, that said last mentioned fine is a lien upon the said vessel, her tackle, apparel, furniture and cargo, which lien is hereby foreclosed, and that the United States have and recover of and against said vessel and claimant their costs herein, taxed in the sum of thirteen hundred ninety-one and 5/100 dollars, and all accruing costs to the date of the sale hereinafter provided for;

It is further ordered, adjudged and decreed that said schooner 'Tokai Maru,' her tackle, apparel, furniture and cargo, exclusive of said fur sealskins, be, and they are hereby, condemned and ordered sold to satisfy said fine of five hundred dollars against said vessel and said fine of five hundred dollars against the captain and crew, hereinbefore declared to be a lien against said vessel, her tackle, apparel, furniture and cargo, and to satisfy the aforesaid costs and accruing costs;

And it is further ordered, adjudged and decreed that said schooner 'Tokai Maru,' her tackle, apparel, furniture and cargo, be, by the United States Marshal for the Third Division of the District of Alaska, sold at public vendue to the highest bidder for cash,

after due notice, as provided by law and the rules and practices of said court, and that said Marshal pay the proceeds arising from such sale, after deducting the costs and expenses thereof, into the registry of this Court, to apply upon said judgment, the surplus, if any, to be held subject to the demand of said claimant.

Done in open court this 21st day of November, 1911.

EDWARD E. CUSHMAN,
District Judge."

Witness excused.

Judge LYONS.—We rest.

Judge SHEPARD.—Before plaintiff rests I wish to inquire of Mr. Ritchie whether he has made further search for and has found his letter, to which the letter from the Japanese vice-consul in evidence is a reply.

Mr. RITCHIE.—No, I hadn't thought of it, but I made a very careful search for it before and I do not believe I could have found it if I had looked again.

Plaintiff rests. [67]

Judge SHEPARD.—I move the Court, formally, and without wishing to reinforce it by argument, for a nonsuit upon the ground that this contract in suit was a contract of employment, mutual and mutually obligatory as to services in the District Court, and simply unilateral and indefinite as to services in the Appellate Court; and upon the ground that any breach of this contract is counted upon in the plaintiff's action as occurring prior to the termina-

tion of proceedings in the District Court, in which under the terms of the contract in the District Court no compensation was earned. As to the telegrams sent in reply to the Japanese Consul's telegrams, no recovery of damages should be based upon those, because agency on the part of the Japanese vice-consul to bind the defendant in this case has not been shown, either expressly or inferentially, and Mr. Ritchie himself has testified on the stand that he didn't regard his services in answering those telegrams as of any particular value; and the consultations which he alleges he engaged in during the few days after the entry of the decree in the District Court and prior to the departure of the master, the agent of the defendant, have had no value proved for them, Mr. Ritchie having stated on the stand that sometimes his talk was worth little or nothing and sometimes a great deal. There is no definite measure of damages even as to that trifling service, and that service properly is part of the District Court service and does not constitute employment in the Appellate Court, being prior to the institution of proceedings in the Appellate Court.

Upon those grounds I move the Court to nonsuit this [68] plaintiff.

(Motion denied; defendant allowed an exception.)

Defense.

Judge SHEPARD.—The evidence on the part of the defense consists solely of depositions taken in Seattle of Mr. Kinya Okajima mentioned in the testimony yesterday, the Japanese vice-consul, and Mr.

James Kiefer, the attorney who prosecuted the appellate proceedings, and of a statement in the affidavit for a continuance which I presented last Saturday to your Honor, seeking a continuance until the deposition of Mr. Numasaki, the master of the vessel, could be taken in Japan, and which continuance was refused under the statute because the plaintiff consented that the statement of what he would testify to in the affidavit stands as his testimony; therefore I take it that the affidavit is to be introduced in evidence for that purpose. I will read the depositions first. These depositions were taken under stipulation for the taking of depositions dated April 18, 1912, made between the plaintiff and myself as defendant's attorney. I will not read the formal parts. The depositions state that they were taken on the 30th day of April before A. C. Bowman, a Commissioner of the United States District Court for the Western District of Washington. Thereupon the following proceedings were had and the depositions of said witnesses taken, as follows, to wit: I will read:

Mr. KIEFER.—It is agreed between Josiah Thomas, Esq., representing the plaintiff, and James Kiefer, representing the defendant, that the depositions of the witnesses named in the stipulation between the parties hereto, may be taken this 30th [69] day of April, 1912, at 2 o'clock P. M., before A. C. Bowman, United States Commissioner in and for the United States District Court for the Western District of Washington, at his office, room 536 Central Building, in the city of Seattle, State of Washington, notice of said time and place being waived.

[Deposition of Kinya Okajima, for Defendant.]

KINYA OKAJIMA, one of the witnesses named in the notice and stipulation to take depositions in the foregoing entitled cause, being duly sworn, testified as follows:

Q. (Mr. KIEFER.) Where do you live?

A. 1211 Terrace Court.

Q. In this city?

A. Yes, Seattle, Washington.

Q. And you lived here in January, 1911?

A. Yes, sir.

Q. You know the plaintiff in this case, Mr. Ritchie, an attorney of Valdez, Alaska?

A. Yes, sir; I know him.

Q. Did you attend court in Valdez, Alaska, in January, 1911, in the case of the United States of America versus the "Tokai Maru" and Choemon Kikuchi, Claimant, Number 477 of the files of that court? A. Yes, sir.

Q. In what capacity, Mr. Okajima?

A. As Japanese interpreter.

Q. For the claimant and owner of the vessel?

A. Yes, sir, for the owner of the schooner.

Q. Now, did you in that capacity meet the plaintiff, Ritchie, in this suit, while you were acting for the owner of that vessel? [70]

A. Yes, sir.

Q. And what was Mr. Ritchie doing?

A. Mr. Ritchie, I understand, was employed by the owner of the schooner to defend him and the

(Deposition of Kinya Okajima.)

crew of the schooner in the trial court.

Q. And the schooner?

A. Yes, and the schooner.

Q. Now, then, was there any other person in attendance on that trial as the agent of the claimant, besides yourself,—was the master of the vessel there? A. Yes, the captain of the vessel.

Q. The captain of the schooner? A. Yes, sir.

Q. State whether or not you, as interpreter, in talking to the officers and crew of the schooner, made any investigation as to the testimony that could be had with reference to whether or not the fish, which formed the basis of the charge against them, were caught inside or outside of the three mile limit.

Mr. THOMAS.—I object as incompetent, immaterial and irrelevant.

By the COURT.—The objection will be overruled.

A. You mean to say that I investigated?

Q. Yes, did you talk to them about what they could testify about that subject?

A. Yes, I had a talk with them, the officers and the crew.

Q. What did you find out?

A. Well, I was told that the fish were caught outside the three mile limit.

Q. You were told that they would so testify?

A. I think they did. You mean before the court?

[71]

Q. Yes, did you ascertain that they could testify to that? A. Yes, sir, sure; yes, sir.

Q. Now, did you get from Mr. Ritchie any of his

(Deposition of Kinya Okajima.)

office files or papers in that suit to bring them away from Valdez with you? A. Not at all; no.

Q. Did you get any of his office files or papers in that suit? A. No, sir.

Q. Now, do you know whether or not the captain of the schooner got any of these office files or papers?

A. He did not at the time I was there, and when I saw him here in Seattle he did not have any.

Q. You went over his papers with him?

A. He talked to me about everything about the case, naturally, as I was his interpreter. He did not have any papers with him.

Q. When you were at Valdez and the Judge decided the case in favor of the Government, what, if any, reason did Mr. Ritchie give you for the loss of the case?

A. Well, he simply said to me that Judge Cushman ought to have decided it the other way. That is all he said to me. He might say a lot more things, but I don't remember. But he said to me that he should have won the case for the owner of the schooner.

Q. Did he give any reason as to why he did not?

A. I do not remember now.

Q. Now, when you came out, did you bring a letter of introduction from Mr. Ritchie to any certain attorney in Seattle, to be employed to conduct the appeal?

A. Well, it was this way. Mr. Ritchie gave me a letter of [72] introduction to a lawyer here named Sullivan, and of course at the time I left

(Deposition of Kinya Okajima.)

Valdez, the master of the schooner did not know whether he will take an appeal or not. But Mr. Ritchie suggested to me to go and see a lawyer and consult with him about the case, and he gave me a letter of introduction to a lawyer named Sullivan. After I came over here I heard something about him which I would not care to say, not very favorable, you know, about him, and I thought I better not go to see him at all, and I did not go to see him at all.

Q. You did not go to see him at all.

A. No, sir.

Q. Did you ever ask Mr. Ritchie, the plaintiff here, to do any work with reference to an appeal?

A. No, not at all.

Q. Did you employ me to conduct an appeal, you and Mr. Abe jointly, the acting consul?

A. Yes, sir.

Q. I will ask you whether that employment was on my part in any way solicited at all?

A. No, sir, not at all; I came to see you myself.

Q. You had been previously acquainted with me?

A. Yes, sir.

Cross-examination.

Q. (Mr. THOMAS.) Were you the agent of the master of the ship in that suit, Numisaki?

A. No, I was employed by the owner of the schooner as interpreter.

Q. You were employed by the owner of the schooner as interpreter for the court proceedings?

[73]

A. Yes, sir.

(Deposition of Kinya Okajima.)

Q. Did you act as agent for him at any time?

A. No, not as agent; no.

Q. Did you deal with Ritchie as agent for the owner of the schooner?

A. Well, I did not understand so; no. I just understood he was employed to defend the schooner and the crew.

Q. Did you know that Ritchie had a written contract with him?

A. I knew that he had a written contract about the taking up the case by Mr. Ritchie for the owner of the schooner.

Q. Are you familiar with the terms of that written contract? A. Well, I read a copy of it once.

Q. You know what it contained?

A. I do not know whether I could remember all or not.

Q. You did read it at that time? A. Yes, sir.

Q. What was the name of the owner of the schooner? A. Choemon Kikuchi.

Q. And Numisaki was the captain?

A. I do not know whether he was agent—he was master of the schooner and therefore he must be agent.

Q. Were you negotiating with Ritchie also with Numisaki about this appeal?

A. About the appeal? Not a bit.

Q. Did you and Ritchie and Numisaki talk about this appeal? A. No, not that I know of.

Q. Then, you came to Seattle. Did you bring any papers at all with you in this case?

(Deposition of Kinya Okajima.)

A. I brought a paper myself from the Court, that is, a copy of the Judge's opinion about the case there, and I paid a fee for it. I submitted it to Abe the vice-consul here afterwards. [74]

Q. Did you get that from the Court or from Ritchie? A. From the Court.

Q. Did you get any papers at all from Ritchie?

A. None that I know of, no.

Q. You say that Ritchie told you to go to Sullivan?

A. No, he did not tell me. He said if I wanted to talk with any lawyer, he was the best lawyer he could think of and that was Sullivan, and he gave me a letter of introduction. And for the reasons I have already stated I did not go to Sullivan.

Q. You say he did not tell you to go to Sullivan and have him appeal this case?

A. No, he did not.

Q. You are positive you did not take Ritchie's files in this case?

A. I am positive I did not take them.

Q. Did anybody else take any of the papers beside you? A. None that I know of.

Q. Did any one come out from there with you at the time? A. No.

Q. You employed Mr. Kiefer yourself, did you?

A. Well, after consulting Mr. Abe, Japanese vice-consul, I went to see Mr. Kiefer.

Q. Was Mr. Abe interested in the schooner in any way?

A. No, but he being at that time acting as vice-consul, you know, the owner of the schooner com-

(Deposition of Kinya Okajima.)

municated to him there through the department of foreign affairs.

Q. You employed Mr. Kiefer, did you, to conduct this case upon appeal?

A. Yes, for the owner of the schooner, yes. [75]

Q. Did the owner authorize you to employ any attorney that you desired in the city of Seattle?

A. That I do not know, but Mr. Abe knows more about it, you know.

Q. But you employed Mr. Kiefer yourself, did you not?

A. I secured Mr. Kiefer's services with the approval of Mr. Abe. I spoke to Mr. Abe about Mr. Kiefer.

Q. You knew at that time that Mr. Numisaki, as agent for Mr. Kikuchi had a contract with Mr. Ritchie?

A. As I said, he had a written contract about defending the schooner at the court at Valdez. I read it.

Q. You read it?

A. Yes. I know that contract had nothing to do with an appeal at all.

Judge SHEPARD.—The deposition is signed Kinya Okajima and subscribed and sworn to before Mr. Bowman as U. S. Commissioner. I will now read the deposition of Mr. Abe.

[Deposition of Kahachi Abe, for Defendant.]

KAHACHI ABE, a witness called on behalf of the defendant, being duly sworn, testified as follows:

Q. (Mr. KIEFER.) You resided in the city of Seattle in January and February, 1911?

A. Yes, sir.

Q. At that time you were acting as Japanese Imperial Consul here in the city of Seattle?

A. Yes, sir.

Q. There was no one else in charge of the consular office here but yourself at that time? A. No.

Q. No; at that time did you have any correspondence with Mr. E. E. Ritchie, of Valdez, plaintiff in this case, about taking an appeal in the "Tokai Maru" case? [76]

A. No, he wrote me that in case of an appeal Mr. Sullivan would be communicated with, but I did not answer.

Q. Do you have, in your possession, or did you ever have in your possession or receive any of the office files of Mr. Ritchie in that case?

A. Once more, please.

Q. Did you ever receive any of the office files of Ritchie in that case, or did you ever have any of them in your possession, any of his papers or office files in the "Tokai Maru" case? A. No.

Q. Did you ask or request or write or telegraph to Mr. Ritchie to take any steps in regard to the appeal of that case? A. No.

Cross-examination.

Q. (Mr. THOMAS.) Did you ever have anything

(Deposition of Kahachi Abe.)

to do with this case prior to the appeal?

A. Yes, sir.

Q. Did you have anything to do with it while pending in the courts there in Alaska?

A. I looked at the proceedings, how it was going on, and I asked Mr. Ritchie about that.

Q. Were you up there at any time?

A. No, sir; I communicated with him by telegraph.

Q. Did you ever communicate with Ritchie prior to the time of the trial in Alaska? A. No.

Q. Did Ritchie write you any letters prior to the time that the case came on for trial up there?

A. No. [77]

Q. Did he write you any letters after that?

A. Yes, sir.

Q. Did you answer him? A. In what matter?

Q. Regarding this matter.

A. Regarding the appeal?

Q. Yes. A. No.

Q. Did you write him regarding the trial of the case up there in the lower court?

A. I asked about the proceedings by telegraph so that I could notify the owner in Japan.

Q. Told him to notify the owner in Japan?

A. Yes.

Q. (Mr. KIEFER.) So that you could notify the owner? A. So that I could notify the owner.

Q. (Mr. THOMAS.) Communicated with him so that you could notify the owner in Japan?

A. Yes, sir.

(Deposition of Kahachi Abe.)

Q. Was that prior to the trial?

A. It was during the trial.

Q. He cabled to you or wrote to you?

A. Well, he answered by cable; also he wrote me in a letter.

Q. That was for the purpose of your taking it up with the owner in Japan?

A. Yes, that was for the purpose of making me familiar with the case so I could let the owner know.

Q. When Mr. Okajima, the witness who preceded you, came down from Alaska, did he come to you?

A. The case began at the Alaska District Court, and the captain [78] wanted an interpreter and wrote me to send up an able interpreter, and so I found Mr. Okajima.

Q. Did you send him up from here?

A. Yes, sir; I sent him to Alaska.

Q. You sent him up there to Alaska?

A. Yes, sir.

Q. To represent whom?

A. To be interpreter to the captain at the court.

Q. You sent him up before the trial?

A. Yes, sir.

Q. After you had heard from Mr. Ritchie?

A. In that matter I had nothing to do with Ritchie, but I acted by request of the captain.

Q. In sending—

A. Okajima as interpreter.

Q. When he came back from Alaska, did he come to your office?

(Deposition of Kahachi Abe.)

A. Yes, sir; he reported the whole proceeding at the court.

Q. He brought the whole proceeding?

A. No, he just reported it verbally.

Q. I misunderstood you. You and Mr. Okajima then employed Mr. Kiefer to prosecute the appeal?

A. No, I did not employ Mr. Kiefer.

Q. Who employed Mr. Kiefer, Mr. Okajima?

A. No, the owner.

Q. Through whom? A. Through the captain.

Q. Through the captain?

A. Yes, sir. At the time the Alaska Court decided against the "Tokai Maru," the owner did not have any thought of appealing, but when Okajima came down and reported the proceedings [79] to me, I went to Mr. Kiefer, and asked his opinion, and I cabled Mr. Kiefer's opinion to the owner, and asked whether the owner wanted to appeal it and then he replied to have Mr. Kiefer appeal the case to the San Francisco court, and then the appeal began.

Q. Do you know the agent Matsutaro Numasaki?

A. He is the captain of the "Tokai Maru."

Q. Did you know him?

A. When he came here I met him.

Q. That was for the trial up north?

A. Yes, that was for the trial in Alaska.

Judge SHEPARD.—The deposition is signed Kahachi Abe, and subscribed and sworn to before Mr. Bowman. I will next read Mr. Kiefer's testimony.

[Deposition of James Kiefer, for Defendant.]

JAMES KIEFER, one of the witnesses named in the annexed stipulation, being duly sworn, testified on behalf of the defendant as follows:

Mr. KIEFER.—I wish to state in the early days of February or early part of February, 1911, I cannot state the exact date, but it was in the early days of February, Mr. Okajima and Mr. Abe came to my office with a copy of the opinion of the Court in the case of the United States vs. the “Tokai Maru” and others, No. 477 of the files of the District Court, at Valdez, and submitted that opinion to me and asked my advice as to an appeal. After going through the facts with them, subsequently an arrangement was entered into with the owner, by which I was employed to prosecute an appeal through Mr. Abe, who has just left the stand.

I may say that they never had or exhibited to me and never had in my presence, and never exhibited to me in any way, any of the papers in the case other than the copy of the opinion of the Court. I inquired for other papers [80] but was informed by both Okajima and Abe that that was the only paper that they had, and they could show me no others. Likewise when the captain came out from Valdez, he came down in the custody of an immigrant official of the United States, and he was unable to give me any other papers.

Judge SHEPARD.—The deposition is by Mr. James Kiefer and sworn to before Mr. Bowman. And then follows the certificate of Mr. Bowman as to

(Deposition of James Kiefer.)

the taking and signing of the testimony. Now, I offer in evidence so much of the affidavit for a continuance as covers the testimony that Mr. Numasaki would give if his deposition were taken in Japan as stated in the affidavit on information and belief. This goes in as though it was given as a deposition in Japan. We moved for a continuance so we could get the deposition of Numasaki and to prevent us having such a continuance it was stipulated by the plaintiff that the statement herein made should be considered as though he has testified to it—I will read that part of the affidavit:

“Said witness (referring to Numasaki), as I am informed and believe, will testify in denial and contradiction of the allegations of the plaintiff’s amended complaint to the effect that after this court had entered a decree of forfeiture in the libel proceeding therein referred to he, defendant’s said agent, conferred and advised with the plaintiff concerning the steps necessary to perfect an appeal from said decree, with the understanding with plaintiff that he should represent defendant’s interests in such appeal, and he will testify to the effect that he, said witness, did not (as is alleged in said amended complaint) take away from Valdez, when he left there after said trial, [81] any papers of the plaintiff, and did not consult with the plaintiff after said trial at all except about some incidental matters relating to said trial, but was taken away from Valdez in custody of the United States marshal almost immediately after said trial was ended.”

Defendant rests.

Rebuttal.

[Testimony of E. E. Ritchie, the Plaintiff (Recalled in Rebuttal).]

E. E. RITCHIE, recalled in rebuttal.

(By Judge LYONS.)

Q. It is stated in this deposition by some of those witnesses, I have forgotten which one, that those people never procured those office copies from you—I want you to tell the jury whether that is true.

Judge SHEPARD.—We object to that as not rebuttal.

By the COURT.—That is preliminary; he may answer that by yes or no.

A. No.

By the COURT.—He testified in the main case that he gave the papers to a particular man. They have come in now with the statement that he didn't give the papers to any of those men and it becomes proper to rebut that.

The WITNESS.—Mr. Okajima procured a copy of the decree made by Judge Overfield in the “Tenyu Maru” case, a seal-poaching case, that had been decided a year or two before; he got a copy of that to take with him. That is the only copy of an opinion that he got. He showed me that after he procured it, the copy in the “Tenyu Maru,” but the files in the “Tokai Maru” case, I gave him copies of several documents—I don't remember what, all, whatever I thought was necessary [82] to be referred to an attorney in Seattle. Mr. Okajima testified there that after he came, he consulted the members of the crew

(Testimony of E. E. Ritchie.)

and found by talking to them that they could have testified to the fact that they didn't catch any fish inside—that is to say, that I didn't get in all the testimony that was necessary. I will state that through Kino, before we took the testimony, I talked to several of the crew, talked to the men who caught the fish and their stories were very uncertain and contradictory. I have had six or seven of these Japanese poaching cases and I find that these Japs are such liars, you can't trust them as witnesses.

Judge SHEPARD.—We move to strike that remark.

(Motion granted. Last sentence stricken from the record.)

WITNESS.—(Continuing.) I will state that I did not put them on because they were not reliable witnesses and I thought they would hurt the case.

Q. Has anybody counterclaimed against you or sought to defend this case against you on the ground of negligence on your part in the presentation of the case in the District Court?

A. I don't remember whether it is in the pleading or not, but it is in the evidence.

(Witness excused.)

Plaintiff rests.

Judge SHEPARD.—I desire to address this Court in favor of my motion for a nonsuit and on the subject of certain instructions which I ask be given.

(Jury excused.)

Judge SHEPARD.—I move the Court to instruct the jury to bring in a verdict for the defendant upon

the ground that no [83] breach of the contract on the part of the defendant has been shown; second, that if any breach has been shown there is no evidence sufficient to base upon it a determination of the damages accruing to the plaintiff from such breach. I move the Court to direct a verdict in favor of the defendant upon those grounds.

After argument the motion was by the Court denied.

Judge Shepard then addressed the Court on the subject of certain instructions requested by him. After which the argument of counsel was had, followed by the instructions of the Court to the jury as follows: [84]

Instructions of the Court.

Gentlemen of the Jury: The pleadings in this case which you will take out to the jury-room with you when you retire to consider the case, as well as the exhibits or matters of written evidence admitted in the case, show that the dispute between these two men is substantially as follows: The Court will only state to you generally regarding them because you take the pleadings with you and you will refer to the pleadings to see just what the controversy is between them, but Mr. Ritchie comes into court in his amended complaint and sues for \$1800, on account of certain services he claims to have rendered in the District Court, and certain services that he was engaged to render in the court of appeals, and which he was wrongfully prevented from rendering by being discharged by the defendant from his employment.

The defendant comes into court and admits generally the written contract which Mr. Ritchie attached to his amended complaint as having been the contract entered into by him through his authorized agent, but he contends that Mr. Ritchie did not earn anything under the provision of it regarding work in the District Court, and that he never agreed to hire him in the Appellate Court; therefore, that he did not break the contract, therefore he is not liable for any damage.

Those are the issues. Now, before the plaintiff can recover in this case, he must convince you by a preponderance of the evidence of the truth and justice of his claim, as he has set it up in his complaint, and unless he has done this, your verdict will be for the defendant.

Now, a preponderance of the evidence means the greater weight [85] of the evidence. It is to some extent a figure of speech, because evidence does not in reality weigh. The greater weight of evidence means, where there is a disputed question, that evidence which appeals to your minds and your experience with the more persuasiveness and overcomes the evidence that is brought forth to dispute it.

Now, in this case Mr. Ritchie, before he can recover, must convince you by a preponderance of the evidence that this contract was made as he claims it was; that it was broken by the defendant, and he was discharged without excuse by the defendant and without his attempting to agree with the plaintiff as to compensation for the appeal; that he was ready, willing and able to perform the services in the Ap-

pellate Court, and that by being denied the privilege and right of performing those services, he was damaged and the amount of that damage. Now, unless he has maintained his case by a preponderance of the proof on those questions, your verdict will be for the defendant.

The Court instructs you that you cannot in this case allow Mr. Ritchie anything for any work done in the District Court; that this contract provided that if Mr. Ritchie won in a certain way in the District Court, he was to receive a thousand dollars; that if he won in a certain other way described in the contract in the District Court, he was to receive \$1,500, but he didn't win in either of those ways, consequently the contract impliedly meant that he was not to receive anything for his work done in the District Court, having lost the case there and this contract meant his winning in the District Court in the first instance—it didn't mean what the result would eventually be in the District Court, after an appeal; it meant winning in the District Court without an appeal. [86]

“This contract provides that Mr. Ritchie is employed in all matters arising out of this alleged law violation by this schooner, and mentions further on in the contract that in case the case is carried to the Court of Appeals or appealed, that he shall be paid such amount as is agreed upon by the owner. Now, that contract contemplated that Mr. Ritchie, if the case went to the Court of Appeals, that he should represent the owner in the Court of Appeals.”

Unless you find that this contract to employ Mr.

Ritchie in the Court of Appeals was still in existence, that it had not been waived or withdrawn from, unless you find that by a preponderance of the evidence and that Mr. Ritchie was wrongfully discharged; that he was ready, willing and able to perform the service in the Court of Appeals,—unless you find those facts by a preponderance of the evidence, it will not be necessary to enter into the question of how much Mr. Ritchie lost by reason of the fact that he did not appear in the Court of Appeals for the defendant in this case. But if you find those issues in Mr. Ritchie's favor by a preponderance of the evidence, it will become your duty to assess his damage by reason of this wrongful discharge, this breach of the contract by the defendant, if you find there was such breach.

If this should become necessary, you will allow the plaintiff such an amount, shown by the evidence, as will fairly and adequately compensate him for the damage he has suffered by being deprived of his right to perform said contract and realize the profits therefrom, that is, such sum as you believe from the evidence the plaintiff would have realized as a profit [87] on the contract, if the plaintiff had not been prevented from performing that contract by the defendant, if the jury find that the plaintiff was so prevented.

The plaintiff has brought this action to recover damages for an alleged breach of the written contract sued upon, Exhibit "A," annexed to the amended complaint, without a rescission of the contract on his part upon or since the occurrence

when, as he claims, the defendant broke the contract; and where he thus seeks his remedy by way of damages for breach of the contract, the damages recoverable by him, if any, are limited to the compensation provided by the contract for what he had done under it prior to the defendant's breach thereof, together with the loss of profits, if any, suffered by him through the defendant having, by his breach, prevented full performance on the plaintiff's part. Such profits to be the agreed compensation or in case of no agreement, the reasonable compensation, for the unperformed part of the contract, less the value of the plaintiff's time which he would have been obliged to expend in performing said part of the contract, and also less the two hundred dollars which in this testimony it is shown that Mr. Ritchie still retains, that was not expended as costs. [88]

The jury are instructed that a case is tried in an Appellate Court upon the record in the trial court. The only points passed upon in an appellate hearing by the appellate Judges are what are claimed by the appellant, or party appealing the case, to be errors of law, that is, incorrect rulings and findings made by the trial Judge.

The appellate Judges consider these alleged errors and decide whether or not in their own opinion of the law error was committed by the trial court of sufficient importance to justify a reversal of the judgment. The cause is presented in the Appellate Court upon the printed record, a copy of which in this case is in evidence here, printed arguments by counsel, and short oral arguments by counsel. Under

the rules governing admiralty causes, new evidence may be introduced on appeal by leave of the Appellate Court, but that was not done in this case; therefore this exception to the general rule has no application. This case was heard upon the record made in the trial court. This record on the claimant's side was made by the plaintiff in the present case,—that is, in the District Court it was made by him. [89]

You are in this as in all other cases tried to a jury the sole and exclusive judges of every question of fact in the case and of the weight of the evidence and the credibility of the witnesses. In arriving at the weight of the evidence and the credibility of the witnesses, you will use all those tests that you have found to be touchstones in arriving at where the truth lies in the human word or human testimony and in human transactions. You will take into consideration the character of the witnesses, in so far as it may appear in the evidence, their conduct and demeanor in giving their testimony, whether they were free, open and frank, whether they kept back or were reluctant witnesses, tried to evade or cover up and conceal, or whether, on the other hand, they were too free, too willing, showed an interest and a bias toward that side of the case for which they were testifying, by volunteering information before it was asked of them.

You will take into consideration the reasonableness of their testimony as a whole, whether it hangs together, whether it is explained, whether it is corroborated where you would expect it to be corrobo-

rated, if it were true or whether it is contradicted by other evidence in the case. You will take into consideration the opportunity that the witnesses have to know and testify about the facts they undertake to testify to. In this connection you will take into consideration any difference in race or language between the parties to the transactions about which the witnesses have undertaken to testify. Those are some of the tests that the law authorizes you to apply, but it is not meant by cataloging these to eliminate others which your experience has shown you to be valuable tests in determining where the truth is in human testimony. [90] You will also take into consideration the interest which any witness has in the result of your verdict, and the plaintiff having testified in his own behalf, you will take into consideration his interest in the result of the case.

The Court will submit to you two forms of verdict, one finding for the defendant, which is a general verdict for the defendant, and the other finding for the plaintiff and assessing his damages, leaving a blank in the verdict for you to fill in with the amount you determine him to have been damaged, if you find that he was damaged.

When you arrive at a verdict, you will cause whichever one of these forms agrees with that verdict to be signed by your foreman, notify the bailiff of the fact that you have agreed and return with it into court.

Judge SHEPARD.—The defendant excepts to that part of the Court's instruction wherein the Court charged the jury that the contract in suit

contemplated that in case of an appeal in the forfeiture case, the plaintiff should be employed to conduct that appeal or employed in connection with it, whatever the exact phraseology was.

The defendant excepts to the refusal of the Court to give to the jury as part of its charge the third instruction requested by the defendant in writing, the instruction reading as follows:

“The jury are instructed that there is nothing in the contract in suit which obligated the plaintiff to render services to the defendant in any Appellate Court, and that therefore the contract did not obligate the defendant to continue the plaintiff’s employment in the proceedings mentioned in the contract beyond the termination of those proceedings in the [91] District Court, and the defendant’s failure to employ the plaintiff in the Appellate Court in connection with those proceedings was not a breach of the contract sued upon in this action.”

The defendant excepts to the Court giving to the jury as a part of its charge the second instruction asked for by the plaintiff as amended by the Court, and this objection is based upon the ground that the instruction is irrelevant, as its tendency is to convey to the minds of the jury an impression that the making up of the record, that is, the saving of exceptions to what is claimed to be error in the District Court, the making of that record up by the plaintiff, who was the attorney in charge in that case, constitutes in some sense a part of the service in the Appellate Court, and the defendant urges upon the Court that it does not constitute such service in the Appellate

Court, that it is the duty of counsel undertaking the conduct of proceedings in the trial court so to conduct the proceedings as to save all claims of error in the Court's rulings, and that nothing of that sort done falls outside of the scope of the service in the District Court, as to which there was a special, contingent contract, and the defendant asks the Court to further instruct the jury so as to cure any such impression—that the making up of the record in the District Court shall in no sense be held as a basis for compensation in the proceedings in the Appellate Court.

By the COURT.—That instruction was given you regarding the record being made in the lower court; it was simply given you so that you will understand that there is not a retrial, a retaking of testimony in the Appellate Court,—that all the testimony is taken in the lower court, or was taken in this particular [92] case and that it is a part of the duty of every attorney in trying a case in the lower court to keep the record in such shape, so that if it becomes necessary to take it to the Appellate Court, it will be in shape to take there and save every point that it occurs to him during the progress of the trial might be for the benefit of his client—that is a part of the work done in the District Court. The exceptions requested are allowed.

Judge LYONS.—The plaintiff desires to save exceptions to the two instructions given by your Honor in regard to the plaintiff's want of right to recover for services in the District Court—the denial of any right to recover.

Exceptions allowed. [93]

I do hereby certify that I am the official Court Stenographer for the Third Judicial Division, District of Alaska, and as such official stenographer reported the proceedings in the trial of the above-entitled cause; that the above is a full, true and correct transcript of the shorthand notes taken by me at said trial.

J. HAMBURGER.

Dated at Valdez, Alaska, May 31, 1912. [94]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 555.

E. E. RITCHIE,

Plaintiff,

vs.

CHOEMON KIKUCHI,

Defendant.

Stipulation for Settlement of Bill of Exceptions.

It is hereby stipulated between the parties to this cause by their respective attorneys herein, that the annexed and foregoing bill of exceptions comprises all the material evidence including exhibits (excepting Plaintiff's Exhibit "D," which contains nothing material to any of the questions to be raised on the defendant's appeal herein), adduced or offered, rulings made, instructions given, or requested and refused, in the course of the Court's charge to the jury, and exceptions noted, during the trial of this cause in the above-named court, and all other matters and proceedings, except those otherwise of record in the

files and journals of said court, in this cause; and that the same may be certified accordingly as the bill of exceptions in this cause, by the Judge of said court who presided at said trial, forthwith and without any formal hearing or order of settlement, and shall be thereupon filed by the clerk of said court as such bill of exceptions.

Dated June 22, 1912.

JOHN LYONS, and
T. P. GERAGHTY,
Plaintiff's Attorneys.
THOMAS R. SHEPARD,
Defendant's Attorney.

Filed in the District Court, Territory of Alaska,
Third Division. Jun. 22, 1912. Ed M. Lakin, Clerk.
By V. A. Paine, Deputy. [95]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 555.

E. E. RITCHIE,

Plaintiff,

vs.

CHOEMON KIKUCHI,

Defendant.

Certificate to Bill of Exceptions.

In pursuance of the annexed and foregoing stipulation between the parties to this cause, dated this day, and in accordance with the facts, the undersigned, the Judge of the above-named court who

presided at the trial of this cause, hereby certifies that the annexed and foregoing bill of exceptions is true, correct and complete, and comprises all the material evidence, including exhibits (excepting Plaintiff's Exhibit "D," which contains nothing material to any of the questions to be raised on the defendant's appeal herein), adduced or offered, rulings made, instructions given, or requested and refused, in the course of the Court's charge to the jury, and exceptions noted, during the trial of this cause in said court, and all other matters and proceedings, except those otherwise of record in the files and journals of the court, in this cause; and the undersigned hereby settles and certifies the same accordingly, as the bill of exceptions in this cause.

Witness the hand of said Judge and the seal of said court, at Valdez, Alaska, this 22d day of June, 1912.

[Seal]

EDWARD E. CUSHMAN

District Judge.

Filed in the District Court, Territory of Alaska, Third Division. Jun. 22, 1912. Ed M. Lakin, Clerk. By V. A. Paine, Deputy. [96]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 555.

E. E. RITCHIE,

Plaintiff,

vs.

CHOEMON KIKUCHI,

Defendant.

Verdict.

We, the jury impaneled and sworn in the above-entitled cause, do upon our oaths find for the plaintiff and assess his damages at \$800.00 and costs.

L. ARCHIBALD,

Foreman.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. May 10th, 1912. Ed M. Lakin, Clerk. By Thos. S. Scott, Deputy.

Entered Court Journal No. 6, page No. 843. [97]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 555.

E. E. RITCHIE,

Plaintiff,

vs.

CHOEMON KIKUCHI,

Defendant.

Motion for New Trial.

Now comes the defendant in this action and moves the Court for an order setting aside the verdict rendered herein on May 10, 1912, and granting a new trial herein, for the following causes materially affecting the substantial rights of this defendant:

First: Irregularity in the proceeding of the court, to wit: Error of the Court in overruling said defendant's demurrer to the plaintiffs amended complaint.

Second: Excessive damages, appearing to have

been given under the influence of passion or prejudice.

Third: Insufficiency of the evidence to justify said verdict.

Fourth: That said verdict is against law in this, to wit: That the written contract on which the plaintiff's cause of action herein is based did not and does not obligate the defendant to employ the plaintiff in any proceedings in any Appellate Court touching the subject matter of said contract, and no liability on the part of the defendant to the plaintiff arose thereunder, and also in this, to wit: That under the law as given by the Court to the jury in its charge to the jury the plaintiff was not entitled to recover the whole value which [98] he placed upon the services which he was ready and willing to render to the defendant in the Appellate Courts, less the sum of \$200 credit allowed by the plaintiff thereon, but only the profit which he would have realized from the performance of such services, and the burden was upon the plaintiff to show the amount of such profit in excess of the costs to himself of performing such services, but he offered no evidence touching such cost or such profit.

Fifth: Error in law occurring at said trial and excepted to by said defendant, to wit: Error of the Court in denying the defendant's motion for an order directing the jury to find a verdict in favor of said defendant, and also error of the Court in refusing to give the jury, as a part of its charge to the jury, the third instruction requested by the defendant, and also error of the Court in giving the jury, as a part

of its charge to the jury, the third instruction requested by the plaintiff, as amended and supplemented by the Court—each of said errors of law being hereby alleged as a separate and complete ground for the granting of this motion.

This motion is based on said verdict and the rulings and instructions of the Court in the course of said trial, and the Court's minutes of said trial, and on all the files, records and proceedings in this cause; and is made upon the grounds shown therefor by said minutes, files, records and proceedings, and herein above specified.

Dated May 13, 1912.

THOMAS R. SHEPARD,
Defendant's Attorney.

Services of the foregoing motion upon me this 13th day of May, 1912, is hereby admitted.

T. P. GERAGHTY,
Plaintiff's Attorney.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division, May 13, 1912. Ed M. Lakin, Clerk. By V. A. Paine, Deputy. [99]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 555.

E. E. RITCHIE,

Plaintiff,

vs.

CHOEMON KIKUCHI,

Defendant.

Order Denying Motion for New Trial.

The defendant in this action having served and filed herein, on the 13th day of May, 1912, his motion in writing for an order setting aside the verdict rendered herein on the 10th day of May, 1912, and granting a new trial herein, for certain causes in said motion specified; and said motion having been brought to a hearing before the Court on this day and argued by counsel for the respective parties, and submitted to the Court for decision, and the Court being fully advised in the premises;

IT IS ORDERED by the Court now here, that said motion be and it hereby is denied.

Done in open court this 14th day of May, 1912.

EDWARD E. CUSHMAN.

District Judge.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division, May 15, 1912. Ed M. Lakin, Clerk. By V. A. Paine, Deputy.

Entered Court Journal No. 6, page No. 819. [100]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 555.

E. E. RITCHIE,

Plaintiff,

vs.

CHOEMON KIKUCHI,

Defendant.

Judgment.

This cause came on for trial on the 9th day of

May, 1912, the plaintiff appearing in person and by his attorneys T. P. Geraghty and John Lyons, and the defendant by his attorney Thomas R. Shepard. A jury of twelve men was regularly impaneled and sworn to try said action. Witnesses on the part of plaintiff were sworn and examined and depositions read on behalf of defendant. After hearing the evidence, the arguments of counsel and the instructions of the Court the jury, on the 10th day of May, 1912, retired to consider of their verdict. Thereafter, on the same day the jury returned into court their verdict, in words and figures as follows, to wit:

“We, the jury impaneled and sworn in the above-entitled cause, do upon our oaths, find for the plaintiff and assess his damages at the sum of \$800, and the costs of this action, taxed at \$———.”

WHEREFORE, by virtue of the law and by reason of the premises, IT IS ORDERED AND ADJUDGED that the plaintiff do have and recover from the defendant the sum of Eight Hundred Dollars (\$800), with interest at the legal rate from this date until paid, together with plaintiff's costs and disbursements incurred in this action, taxed at [101] \$93.05. Signed at Valdez, Alaska, this 15th day of May, 1912.

EDWARD E. CUSHMAN,
Judge.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division, May 15, 1912. Ed M. Lakin, Clerk. By Thos. S. Scott, Deputy.

Entered Court Journal No. 6, page No. 823. [102]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 555.

E. E. RITCHIE,

Plaintiff,

vs.

CHOEMON KIKUCHI,

Defendant.

Stipulation and Order That Original Bill of Exceptions be Sent Up on Appeal.

It is hereby stipulated between the parties to this cause, by their respective attorneys herein, that with the sanction of the above-named court, the clerk of the court, in making up the record on appeal to be certified and transmitted to the United States Circuit Court of Appeals for the Ninth Circuit for the hearing of the defendant's appeal from the judgment herein, shall withdraw from the files of this court and include in said record on appeal the original bill of exceptions this day certified and filed herein, in lieu of a copy thereof.

Dated June 22, 1912.

JOHN LYONS, and

T. P. GERAGHTY,

Plaintiff's Attorneys.

THOMAS R. SHEPARD,

Defendant's Attorney.

Ordered accordingly, this 22d day of June, 1912.

EDWARD E. CUSHMAN,

District Judge.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Jun. 22, 1912. Ed M. Lakin, Clerk. By Thos. S. Scott, Deputy. [103]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 555.

E. E. RITCHIE,

Plaintiff,

vs.

CHOEMON KIKUCHI,

Defendant.

Petition for Allowance of Writ of Error.

To the Honorable EDWARD E. CUSHMAN, District Judge, Presiding in the Above-named District Court.

Now comes Choemon Kikuchi, the defendant in this cause, by Thomas R. Shepard, his attorney therein, and feeling himself aggrieved by the judgment rendered and entered therein by the above-named court on the 15th day of May, 1912, respectfully petitions said court and your Honor, the Judge presiding therein, to allow the issuance in his behalf of a writ of error to remove said cause to the United States Circuit Court of Appeals for the Ninth Circuit for a review by said court of said judgment, according to the laws of the United States in that behalf made and provided, and herewith he files an assignment of errors by him asserted and intended to be urged on the hearing of said cause by said circuit court of appeals, pursuant to such writ of error.

And your petitioner further prays for an order fixing the amount of the security which he shall give in order to entitle him to such writ of error and which shall operate as a *supersedeas* of said judgment pending the review thereof pursuant to such writ, and directing that, upon the giving of [104] such security, such writ of error and a citation to the above named plaintiff do issue accordingly.

Dated July 1, 1912.

THOMAS R. SHEPARD,
Defendant's Attorney.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. July 1, 1912. Ed M. Lakin, Clerk. By Thos. S. Scott, Deputy. [105]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 555.

E. E. RITCHIE,

Plaintiff,

vs.

CHOEMON KIKUCHI,

Defendant.

Assignment of Errors.

Now comes Choemon Kikuchi, the defendant in this cause, and files with the clerk of the above-named court with his petition this day presented to said Court for the allowance of a writ of error removing this cause to the United States Circuit Court of Appeals for the Ninth Circuit for a review by said

court of the judgment of this court rendered and entered herein on the 15th day of May, 1912, this his assignment of errors which he asserts were committed by said District Court on the trial and in the course of the proceedings therein had in this cause, upon each of which errors he will rely on the hearing of this cause by said Circuit Court of Appeals pursuant to said writ of error, to wit:

I.

Said District Court erred in overruling said defendant's demurrer to the plaintiff's amended complaint.

II.

Said District Court erred in sustaining the plaintiff's demurrer to the second and affirmative defense set forth in the defendant's answer to the plaintiff's amended complaint.

III.

Said District Court erred in denying the defendant's motion for a continuance of the trial of said [106] cause in order to afford opportunity for taking by deposition in Japan the testimony of Matsutaro Numazaki as a witness for the defendant.

IV.

Said District Court erred in overruling, on the trial of said cause, the defendant's objection to the plaintiff's testimony to conversations leading up to and preceding the written contract in suit; which testimony, with the defendant's objections thereto and the Court's ruling thereon, was as follows:

“Q. Why wasn't the exact amount of your fees fixed for your services in the Appellate

Court, in case the case went to the Appellate Court?

A. I explained to the captain at a great deal of length what was necessary to do for the trial of the case and also the possibility that it might be decided adversely to us in this court.

Mr. SHEPARD.—Before the contract was signed?

Mr. RITCHIE.—Yes, before the contract was signed and at the time.

Judge SHEPARD.—We object to these matters leading up to this contract.

By the COURT.—You are not undertaking to contradict or vary any of the terms of this contract?

Mr. RITCHIE.—No, sir.

Objection overruled,—to which ruling of the Court counsel for defendant excepts—exception allowed.”

V.

Said District Court erred in denying the defendant's motion, made on the trial of said cause upon the plaintiff's resting his case at the close of his evidence in chief, that the plaintiff be nonsuited.

VI.

Said District Court erred in denying the defendant's motion, made on the trial of said cause at the close of all the evidence, that the Court direct the jury to find a verdict in favor of the defendant.
[107]

VII.

Said District Court erred on the trial of said cause

in instructing the jury, in the course of the Court's charge, in substance and effect, that the contract in suit contemplated that the plaintiff, if the case to which said contract related should go to the Court of Appeals, should represent the defendant in the Court of Appeals; which instruction, with the defendant's exception thereto, was as follows:

"This contract provides that Mr. Ritchie is employed in all matters arising out of this alleged law violation by this schooner and mentions further on in the contract that in case the case is carried to the Court of Appeals, or appealed, that he shall be paid such amount as is agreed upon by the owner. Now, that contract contemplated that Mr. Ritchie, if the case went to the Court of Appeals, that he should represent the owner in the Court of Appeals."

"Judge SHEPARD.—The defendant excepts to that part of the Court instructions wherein the Court charged the jury that the contract in suit contemplated that in case of an appeal in the forfeiture case, the plaintiff should be employed to conduct that appeal or employed in connection with it, whatever the exact phraseology was."

VIII.

Said District Court erred on the trial of said cause in refusing the defendant's request that the Court give the jury the following instruction in the course of its charge to the jury, to wit:

(3) "The jury are instructed that there is nothing in the contract in suit which obligated

the plaintiff to render services to the defendant in any Appellate Court, and that, therefore, the contract did not obligate the defendant to continue the plaintiff's employment in the proceedings mentioned in the contract beyond the termination of those proceedings in the District Court, and the defendant's failure to employ the plaintiff in the Appellate Court in connection with those proceedings was not a breach of the contract sued in this action." [108]

IX.

Said District Court erred in denying the defendant's motion for a new trial of said cause.

X.

Said District Court erred in rendering judgment in favor of the plaintiff and against the defendant in said cause.

WHEREFORE said defendant (plaintiff in error) prays that said judgment may be reversed by said United States Circuit Court of Appeals for the Ninth Circuit, with directions to said District Court for such further proceedings therein as may be proper.

Dated July 1, 1912.

THOMAS R. SHEPARD,
Attorney for Defendant,

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. July 1, 1912. Ed M. Lakin, Clerk. By Thos. S. Scott, Deputy. [109]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 555.

E. E. RITCHIE,

Plaintiff,

vs.

CHOEMON KIKUCHI,

Defendant.

Order Allowing Writ of Error.

On reading and filing the petition of Choe-mon Kikuchi, the defendant in this cause, dated this day, for the allowance of a Writ of Error removing this cause to the United States Circuit Court of Appeals for the Ninth Circuit for a review by said court of the judgment of this court rendered and entered herein on the 15th day of May, 1912, and said defendant's assignment of errors thereon, dated this day, and on motion of Mr. Thomas R. Shepard, attorney for said defendant,—

IT IS ORDERED by the Court now here, that said writ of error be and hereby is allowed, and do issue out of the office of the clerk of this court upon said defendant's filing therein a bond on his part in the penal sum of twelve hundred and fifty dollars (\$1250) with two sufficient sureties, conditioned that said defendant (plaintiff in error) shall prosecute his said writ of error to effect, and answer all damages and costs if he fail to make his plea good, which bond shall first be approved, as to form, sufficiency and sureties, by the Judge of this court; and that thereupon a cita-

tion to the plaintiff (defendant in error), do issue in due form of law.

Done in open court, this first day of July, [110] 1912.

EDWARD E. CUSHMAN,
Judge of the District Court for the Territory of
Alaska, Third Division.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Jul. 1, 1912. Ed M. Lakin, Clerk. By Thos. S. Scott, Deputy.

Entered Court Journal No. 6, page No. 863. [111]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 555.

E. E. RITCHIE,

Plaintiff,

vs.

CHOEMON KIKUCHI,

Defendant.

Supersedeas Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS:
That we, Choemon Kikuchi, the defendant in the above-entitled cause (by Thomas R. Shepard, his attorney therein, hereunto duly authorized), as principal, and S. A. Hemple and Sarah I. Hemple, both of Valdez, Alaska, as sureties, are held and firmly bound unto E. E. Ritchie, the plaintiff in said cause, in the penal sum of Twelve Hundred and Fifty Dollars (\$1250), lawful money of the United States of

America, to be paid unto said obligee, his representatives or assigns; for which payment, well and truly to be made, we bind ourselves and our respective heirs and representatives, jointly and severally, firmly by these presents. Sealed with our seals and dated at Valdez, Alaska, this first day of July, 1912.

The condition of this obligation is such that whereas, lately, at a session of the above-named District Court for the Territory of Alaska, Third Division, holden at Valdez therein, in the above-entitled action pending in said court between the above-named obligee E. E. Ritchie, the plaintiff therein, and the above-named principal obligor Choemon Kikuchi, the defendant therein, a judgment was rendered and entered by said court on the 15th day of May, 1912, in favor of said plaintiff and against said defendant, [112] and said defendant is about to sue out a writ of error from the United States Circuit Court of Appeals for the Ninth Circuit to said District Court for a review of said judgment.

NOW, THEREFORE, the condition of this obligation is such that if said defendant (plaintiff in error) shall prosecute his said writ of error to effect, and answer all damages and costs if he fail to make his plea good, then this obligation shall be void; else, valid.

CHOEMON KIKUCHI.

By THOMAS R. SHEPARD,

His Attorney. [Seal]

S. A. HEMPLE. [Seal]

SARAH I. HEMPLE. [Seal]

United States of America,
District of Alaska,—ss.

S. A. Hemple and Sarah I. Hemple, being first duly sworn, each severally deposes and says: That affiant is one of the persons named as sureties in and who executed the foregoing supersedeas bond on writ of error in the above-entitled cause; that affiant is a resident within the District of Alaska, and is not a counsellor or attorney at law, marshal, deputy marshal, commissioner, clerk of any court, or other officer of any court, and that affiant is worth twelve hundred and fifty dollars (\$1250), the amount specified in said bond as the penal sum thereof, over and above all debts and liabilities, and exclusive of property exempt from execution.

S. A. HEMPLE.

SARAH I. HEMPLE.

Subscribed and sworn to before me this first day of July, 1912.

[Seal]

THOMAS R. SHEPARD,

United States Commissioner in and for the District
of Alaska, Residing at Valdez. [113]

The within and foregoing bond is hereby approved by me, as to form, sufficiency and sureties, this first day of July 1912.

EDWARD E. CUSHMAN,

Judge of the District Court for the Territory of
Alaska, Third Division.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Jul. 1, 1912. Ed M. Lakin, Clerk. By Thos. S. Scott, Deputy. [114]

Filed in the District Court, Territory of Alaska,
Third Division. Jul. 1, 1912. Ed M. Lakin, Clerk.
By Thos. S. Scott, Deputy.

Writ of Error.

United States of America,
District of Alaska,—ss.

The President of the United States of America, to
the Honorable, the Judge of the District Court
for the Territory of Alaska, Third Division,
Greeting:

Because in the record and proceedings, as also in
the rendition of the judgment of a plea which is in the
said District Court before you, numbered 555 on the
register of said court, between E. E. Ritchie, the
plaintiff therein, and Choemon Kikuchi, the defend-
ant therein a manifest error hath happened, to the
great damage of the said Choemon Kikuchi, plaintiff
in error, as by his complaint appears;

We, being willing that error, if any hath been,
should be duly corrected and full and speedy justice
be done to the party aforesaid in this behalf, do com-
mand you, if judgment be therein given, that then
under your seal, distinctly and openly, you send the
record and proceedings aforesaid and all things con-
cerning the same, to the Judges of the United States
Circuit of Appeals for the Ninth Circuit, in the
City and County of San Francisco, in the State of
California, together with this writ, so as to have the
same at said place in said circuit on the 31st day of
July, 1912, and so that the record and proceedings
aforesaid being inspected, said Circuit Court of Ap-

peals may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States ought to be done.

Witness, the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the Supreme Court of the United States, at our city of Washington, on this first day of July, A. D. 1912, and of the Independence of the United States the one hundred and thirty-sixth.

Given under my hand and the seal of said District Court, at Valdez, Alaska, on the date last above written.

EDWARD E. CUSHMAN,
District Judge, Presiding in the District Court for
the Territory of Alaska, Third Division.

Attest: ED M. LAKIN,
Clerk of said District Court.

Entered Court Journal No. 6, page No. 863. [115]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 555.

E. E. RITCHIE,

Plaintiff,

vs.

CHOEMON KIKUCHI,

Defendant.

Citation.

United States of America,
District of Alaska,—ss.

The President of the United States of America, to
E. E. Ritchie, Greeting:

You are hereby cited and admonished to be and ap-

pear at the United States Circuit Court of Appeals for the Ninth Circuit, to be holden in the City and County of San Francisco, in the State of California, on the 31st day of July, 1912, pursuant to a writ of error this day filed in the office of the Clerk of the District Court for the Territory of Alaska, Third Division, at Valdez, Alaska, and a copy of which writ is there lodged for you, wherein the above named Choemon Kikuchi is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered and entered by said District Court in the above-entitled cause on the 15th day of May, 1912, and in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the Supreme Court of the United States, and the seal of said District Court, this first day of July, A. D. 1912, and of the Independence of the United States the one hundred and thirty-sixth.

EDWARD E. CUSHMAN,

District Judge, Presiding in the District Court for the Territory of Alaska, Third Division.

[Seal]

Attest: ED M. LAKIN,

Clerk of the District Court for the Territory of Alaska, Third Division.

Service of the foregoing citation upon me by delivery of a copy thereof, at Valdez, Alaska, on this first day of July, 1912, is acknowledged.

E. E. RITCHIE,

Defendant in Error.

Entered Court Journal No. 6, page No. 865. [116]

Filed in the District Court, Territory of Alaska,
Third Division. Jul. 11, 1912. Ed M. Lakin, Clerk.
By Thos. S. Scott, Deputy.

*In the District Court for the Territory of Alaska,
Third Division.*

No. 555.

E. E. RITCHIE,

Plaintiff,

vs.

CHOEMON KIKUCHI,

Defendant,

Stipulation as to Record on Appeal.

It is hereby stipulated between the parties to this cause that the record on the pending appeal of the defendant herein shall consist of a transcript of the following files and records herein and no others, together with the original bill of exceptions (to be sent up in lieu of a copy thereof pursuant to stipulation and order of this court heretofore made), said files and records so to be transcribed and said bill of exceptions comprising everything material to the questions to be raised on said appeal, to wit:

Amended complaint.

Motion for order requiring separate causes of action in amended complaint to be separately stated.

Order denying said motion.

Demurrer to amended complaint.

Order overruling said demurrer.

Answer to amended complaint.

Demurrer to answer.

Order sustaining said demurrer.

Motion for continuance and notice of hearing thereof.

Affidavit for continuance.

Order denying motion for continuance.

Original of bill of exceptions, including stipulation and certificate attached thereto. [117]

Verdict.

Motion for a new trial.

Order denying motion for a new trial.

Judgment.

Stipulation and order that original bill of exceptions be sent up on appeal.

Petition for allowance of writ of error.

Assignment of errors.

Order allowing writ of error.

Supersedeas bond on writ of error.

Writ of error.

Citation.

And this stipulation.

Dated July 11, 1912.

JOHN LYONS, and

T. P. GERAGHTY,

Attorneys for Plaintiff.

THOMAS R. SHEPARD,

Attorney for Defendant. [118]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 555.

E. E. RITCHIE,

Plaintiff,

vs.

CHOEMON KIKUCHI,

Defendant,

**Certificate of Clerk District Court to Transcript of
Record, etc.**

United States of America,
Territory of Alaska,
Third Division,—ss.

I, Ed M. Lakin, Clerk of the District Court, Territory of Alaska, Third Division, do hereby certify that the foregoing and hereto attached, typewritten pages, numbered from 1 to 119, inclusive, are a full, true and correct transcript of the records and files of the proceedings in the above-entitled cause as the same appears on the records and files in my office; that this transcript is made in accordance with the praecipe filed in my office, July 11th, 1912, and made a part of said transcript, and I hereby certify that the foregoing transcript has been prepared, examined and certified to by me, and that the cost thereof, amounting to Thirteen Dollars and Eighty Cents (\$13.80), have been paid to me by the plaintiff in error.

IN WITNESS WHEREOF, I have hereunto set

my hand and affixed the seal of said Court this 18th day of July, A. D. 1912.

[Seal]

ED M. LAKIN,
Clerk. [119]

[Endorsed]: No. 2165. United States Circuit Court of Appeals for the Ninth Circuit. Choemon Kikuchi, Plaintiff in Error, vs. E. E. Ritchie, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court for the Territory of Alaska, Third Division.

Filed August 1, 1912.

FRANK D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

IN THE
United States Circuit Court of Appeals
IN AND FOR THE NINTH CIRCUIT

CHOEMON KIKUCHI,
Plaintiff in Error,

vs.

E. E. RITCHIE,
Defendant in Error.

No. 2165.

WRIT OF ERROR TO THE DISTRICT COURT
FOR THE TERRITORY OF ALASKA,
THIRD DIVISION.

HON. E. E. CUSHMAN, Judge.

BRIEF OF PLAINTIFF IN ERROR

JAMES KIEFER,
Attorney for Plaintiff in Error.

Suite 655 Colman Building,
Seattle, Wash.

IN THE
United States Circuit Court of Appeals
IN AND FOR THE NINTH CIRCUIT

CHOEMON KIKUCHI,

Plaintiff in Error,

vs.

E. E. RITCHIE,

Defendant in Error.

No. 2165.

WRIT OF ERROR TO THE DISTRICT COURT
FOR THE TERRITORY OF ALASKA,
THIRD DIVISION.

HON. E. E. CUSHMAN, Judge

STATEMENT OF THE CASE.

This action was brought by the Defendant in Error against the Plaintiff in Error to recover for an alleged attorney's fee. From the exhibits attached to the amended complaint, printed record pages 6-7, it appears that the Defendant in Error entered into a contract with the agent of Plaintiff in Error to perform certain services in the district court of Alaska for a contingent fee. The result of the case was such as to preclude the Defendant in

Error from claiming anything for his services in the trial court. It appears, however, from the amended complaint, printed record pages 2-6, that the Defendant in Error claimed to recover both for services rendered in the district court and services which he was prevented from rendering upon appeal. Upon the trial the Defendant in Error testified that he had not earned or become entitled to anything for his services in the district court, printed record pages 46-7. Both in his complaint and in his testimony in places the Defendant in Error appears to rely upon his written contract of November 12th, 1910, and in other places he appears to rely upon the alleged verbal employment by the agents of the Plaintiff in Error after the entry of the decree in the court below. The testimony of the Defendant in Error as to his alleged subsequent employment to prosecute the appeal is very weak and inconclusive. The alleged verbal conversations were denied by the persons with whom they were claimed to have transpired, printed record pages 76-82-88. The Defendant in Error upon the trial offered his own testimony as to the alleged contract of employment upon appeal and offered evidence of the value of his services. Plaintiff in Error offered evidence tending to disprove the alleged employment of the Defendant in Error to conduct the appeal. A verdict was rendered in favor of the Defendant for \$800.00 and judgment entered thereon. To reverse this judgment this writ of error is prosecuted.

“ASSIGNMENT OF ERRORS.

I.

Said District Court erred in overruling said defendant's demurrer to the plaintiff's amended complaint.

II.

Said District Court erred in sustaining the plaintiff's demurrer to the second and affirmative defense set forth in the defendant's answer to the plaintiff's amended complaint.

III.

Said District Court erred in denying the defendant's motion for a continuance of the trial of said (106) cause in order to afford opportunity for taking by deposition in Japan the testimony of Matsutaro Numazaki as a witness for the defendant.

IV.

Said District Court erred in overruling, on the trial of said cause, the defendant's objection to the plaintiff's testimony to conversations leading up to and preceding the written contract in suit; which testimony, with the defendant's objections thereto and the Court's ruling thereon, was as follows:

“Q Why wasn't the exact amount of your fees fixed for your services in the Appellate Court, in case the case went to the Appellate Court?

A I explained to the captain at a great deal of length what was necessary to do for the trial of the case and also the possibility that it might be decided adversely to us in this court.

MR. SHEPARD: Before the contract was signed?

MR. RITCHIE: Yes, before the contract was signed and at the time.

JUDGE SHEPARD: We object to these matters leading up to this contract.

BY THE COURT: You are not undertaking to contradict or vary any of the terms of this contract?

MR. RITCHIE: No, sir.

Objection overruled—to which ruling of the Court counsel for defendant excepts—exception allowed.”

V.

Said District Court erred in denying the defendant's motion, made on the trial of said cause upon the plaintiff's resting his case at the close of his evidence in chief, that the plaintiff be nonsuited.

VI.

Said District Court erred in denying the defendant's motion, made on the trial of said cause at the close of all the evidence, that the Court direct the jury to find a verdict in favor of the defendant (107).

VII.

Said District Court erred on the trial of said cause in instructing the jury, in the course of the Court's charge, in substance and effect, that the contract in suit contemplated that the plaintiff, if the case to which said contract related should go to the Court of Appeals, should represent the defendant in the Court of Appeals; which instruction, with the defendant's exception thereto, was as follows:

“This contract provides that Mr. Ritchie is employed in all matters arising out of this alleged law violation by this schooner and mentions further on in the contract that in case the case is carried to the Court of Appeals, or appealed, that he shall be paid such amount as is agreed upon by the owner. Now, that contract contemplated that Mr. Ritchie, if the case went to the Court of Appeals, that he should represent the owner in the Court of Appeals.”

“**JUDGE SHEPARD:** The defendant excepts to that part of the Court instructions wherein the Court charged the jury that the contract in suit contemplated that in case of an appeal in the forfeiture

case, the plaintiff should be employed to conduct that appeal or employed in connection with it, whatever the exact phraseology was.”

VIII.

Said District Court erred on the trial of said cause in refusing the defendant’s request that the Court give the jury the following instruction in the course of its charge to the jury, to-wit:

(3) “The jury are instructed that there is nothing in the contract in suit which obligated the plaintiff to render services to the defendant in any Appellate Court, and that, therefore, the contract did not obligate the defendant to continue the plaintiff’s employment in the proceedings mentioned in the contract beyond the termination of those proceedings in the District Court, and the defendant’s failure to employ the plaintiff in the Appellate Court in connection with those proceedings was not a breach of the contract sued in this action.” (108.)

IX.

Said District Court erred in denying the defendant’s motion for a new trial of said cause.

X.

Said District Court erred in rendering judgment in favor of the plaintiff and against the defendant in said cause.

ARGUMENT.

I.

We will discuss together the first, fifth, sixth, seventh and eighth assignments of error. These involve the question of the construction of the contract relied upon by the Defendant in Error as the basis of his recovery. This contract appears in full at pages 6-7 of the printed record. The court below

overruled the demurrer of Defendant in Error to the amended complaint. At the conclusion of the plaintiff's testimony the defendant moved for a non-suit and at the close of the evidence defendant moved for an instructed verdict in his favor which motion was by the court denied. The court instructed the jury as follows:

"This contract provides that Mr. Ritchie is employed in all matters arising out of this alleged law violation by this schooner and mentions further on in the contract that in case the case is carried to the Court of Appeals, or appealed, that he shall be paid such amount as is agreed upon by the owner. Now, that contract contemplated that Mr. Ritchie, if the case went to the Court of Appeals, that he should represent the owner in the Court of Appeals."

To this instruction the Plaintiff in Error saved timely exception. The Plaintiff in Error requested the court to instruct the jury as follows:

"The jury are instructed that there is nothing in the contract in suit which obligated the plaintiff to render services to the defendant in any Appellate Court, and that, therefore, the contract did not obligate the defendant to continue the plaintiff's employment in the proceedings mentioned in the contract beyond the termination of those proceedings in the District Court, and the defendant's failure to employ the plaintiff in Appellate Court in connection with those proceedings was not a breach of the contract sued in this action."

To the refusal of this instruction Plaintiff in Error saved timely exception .

We submit that a careful study of this contract will show that by it the Defendant in Error was re-

tained to conduct only the trial court proceedings and the habeas corpus proceedings. In the first three lines of the contract as shown on page 7 of the printed record the Defendant in Error agrees to appear as proctor to resist the forfeiture of the schooner in the *District Court of Alaska*. There is nothing whatever in the contract which states or implies that the Defendant in Error is to render any services upon appeal. The only reference to a possible appeal is found in the last sentence of the contract which provides that if the forfeiture case goes to the Appellate Courts, the Defendant in Error is to receive such further compensation as may be agreed on with the owner. This last sentence is to be treated as having been placed in the contract by the Defendant in Error for his own protection; that it might not be contended that he was to render any services upon an appeal until a further contract for additional compensation had been entered into.

There being nothing in the contract which either directly or impliedly affords any ground for claiming that the Defendant in Error was retained to conduct the appeal in the event that one should be taken, the rights and obligations of the parties must be judged by the rules of the common law.

At common law the retainer of an attorney for the defendant terminated with judgment against his client.

Kamm vs. Stark, 1st Sawyer 547.

Berthold vs. Fox, 21 Minn. 51.

Hillegass vs. Bender, 78 Ind. 227.

Test vs. Larsh, 98 Ind. 301.

The Plaintiff in Error was entitled to a peremptory instruction in his favor for other reasons. The Defendant in Error testified as follows with regard to his subsequent employment:

“After the decree was entered up, as I was starting to say a while ago, I talked several days to Okijima, the Japanese agent, and the distinct understanding was that I was to take the case up on appeal, pursuant to my written contract; there was no dispute about that, but I told Mr. Okajima that if he had any doubt as to my ability or it being advisable for me to try to carry it through alone, as we had lost it in this court, and he desired to get somebody outside, it was entirely agreeable to me for him to do so, except I wanted to have some choice in naming the man, I told him, though, that if he would pick out any well-known and reputable attorney—(Objection sustained).

Q Did you perform any services after the decree was entered up here?

A “Nothing except to answer two telegrams from the Japanese consul and to advise with the captain and Mr. Okajima, separately and together as to the steps necessary to be taken. Printed record pp. 33-34.

The cablegram received and answered by Defendant in Error appear at pages 36-37 of the printed record as Plaintiff's Exhibit “B.” At page 37 printed record it appears that the Defendant in Error wrote to the Japanese consul to inquire about his future relation to the case and he received a short letter from him and also a letter from the captain of the vessel, the agent with whom the contract of November 12, 1910, was made, appearing in the record as Exhibit “C,” printed record pages 38-39. At page 39, printed record, the Defendant in Error tes-

tified that since receiving Exhibit "C" he had done nothing. At page 46 of the printed record on cross examination the Defendant in Error testified:

Q "In so far as the District Court services are concerned you did not, then, up to the conclusion of the District Court proceedings and the entry of the decree, under the terms of your contract, you did not earn, become entitled to, anything?

A "No.

Q "And if there had been no appeal prosecuted from either of those decisions would you have been entitled to anything, as you construe the contract?

A "I would not."

At pages 48-49 of the printed record he says:

Q "And you say during those discussions, after the district court proceedings was completed by the entry of the decree, it was agreed between you and the master of the vessel that you should have charge of the appeal?

A "It was distinctly agreed, that being the interpretation that we both put on the contract."

Q "You haven't sued on any such new agreement, you simply sue on the contract."

A "Suing for a breach of the contract."

Q "You named to them Potter Charles Sullivan, who is a member of the Seattle bar, as the attorney whom you desired them to associate with you in the appeal?

A "If we had anyone; it was uncertain whether anybody should be taken in, because I explained I was going to San Francisco any way, but if they thought they would rather have another attorney in it, would be agreeable to me, in spite of my contract, that they should take him in, and I suggested Sullivan.

Q "Was there any new consideration passing between you and the defendant or any of his representatives, any consideration passing from you or

to the defendant for this agreement or understanding, after the decree in the district court was entered?

A "None except the time I spent talking to them and my office files which I loaned to them to assist in getting up the appeal." * * *

Q "Suppose, Mr. Ritchie, that you had charge of the appeal but had not succeeded any further than just as it did on the appeal as it was conducted, would you then have been entitled under your contract to anything for services in the district court?"

A "Not for services in the district court? (P. R. 52-3.)

Q "Supposing that the Japanese consul had any right to send you those telegrams, what value do you attach to your services in replying to them?"

A "Hardly anything—it was just an evidence of how the contract was regarded." (P. R. 54.)

The foregoing excerpts from the testimony of the Defendant in Error show conclusively that he was allowed to recover upon the theory of a breach of the retainer agreement of November 12th. We have undertaken to show and think we have shown that the trial court was in error in its interpretation of the contract, and that the retainer and employment of the Defendant in Error ceased when the final decree was entered. These excerpts also show very clearly the flimsy trifling nature of the claim of Defendant in Error to recover for any services rendered in connection with the appeal. Assuming, but not conceding, the subsequent verbal employment to conduct the appeal as testified to by him it is plain that he can only recover upon a *quantum meruit* for services actually rendered. Upon this point we cite

French vs. Cunningham, 49 N. E. 797; 149 Ind. 632.

Quint and Hardy vs. Ophir Silver Mining Co.,

4 Nev. 304.

Cyc. Vol. 4, page 991.

There can be no doubt of the right of the client to terminate the relation at any time and he becomes liable to his attorney upon a *quantum meruit* only for the value of services actually rendered.

Swartz vs. Earls, 53 Ill. 237.

Moyer vs. Graham, 15 Lea 57 (Tenn.).

We will now consider the nature and extent of the services rendered by the Defendant in Error under his alleged contract of employment to conduct the appeal. The above excerpts from his testimony show clearly that he rendered only the most trifling services and none of these directly in connection with the appeal. The discussion of the advisability of taking an appeal certainly did not entitle him to any compensation neither would the answering of two cablegrams entitle him to any compensation. Defendant in Error himself at page 51, P. R., declines to put any value upon his alleged services in these matters. The conversations with Okajima and with the master of the schooner as detailed by Defendant in Error amounted to nothing more than negotiations for his employment to conduct the appeal. Defendant in Error actually did nothing toward the taking of the appeal, prepared no papers, investigated neither law or fact, and, to sum it all up, from his own showing did nothing more than to negotiate for his employment to take the appeal. In order to entitle the Defendant in Error to have submitted to the

jury the question of compensation for such services as he rendered after the entry of the final decree some showing of substantial services, of exertion or effort on his part was required. The law does not care about little things. The Defendant in Error cannot be allowed to recover upon his mere willingness and readiness to perform services. The Plaintiff in Error was entitled to have the peremptory instruction requested upon the trial given to the jury.

II.

The court certainly erred in admitting upon the trial of the cause the plaintiff's testimony of conversations leading up and preceding the written contract in suit. This action of the court forms the basis of the fourth assignment of error found on pages 111-112 of printed record. In order to sustain his theory that the contract in suit included an employment on appeal the plaintiff was permitted over the objections of the Plaintiff in Error to testify as follows:

Q "Why was not the exact amount of your fees fixed for the services in the appellate court, in case the case went to the appellate court?"

A "I explained to the captain at a great deal of length what was necessary to do for the trial of the case and also the possibility that it might be decided adversely to us in this court.

MR. SHEPARD: "Before the contract was signed?

MR. RITCHIE: "Yes, before the contract was signed and at the time."

Objection overruled. Exception allowed.

If there ever was a case presenting a strong reason for invoking the rule excluding evidence of nego-

tiations leading up to a written contract we have it here. The defendant in this case (Plaintiff in Error) was represented by a sea captain unable to speak a word of English and obliged to talk wholly through an interpreter with one speaking the language of the country and supposed to be trained in its laws. When a lawyer has reduced a contract to writing between himself and his client he certainly should be held to the rule that the writing embodies the entire contract and that no evidence can be offered to enlarge or to modify it. It seems to us that the admission of this evidence is in such flagrant violation of the well settled rule that further comment is unnecessary.

Summing up the entire matter, we submit that the Defendant in Error has failed to make out any case either by his pleadings or his evidence and that the motion for a peremptory instruction should have been granted and that the judgment should be reversed and the cause ordered dismissed.

Respectfully submitted,

JAMES KIEFER,
Attorney for Plaintiff in Error.

IN THE
UNITED STATES CIRCUIT
COURT OF APPEALS
IN AND FOR THE NINTH CIRCUIT

CHOEMON KIKUCHI,
Plaintiff in Error,

VS.

E. E. RITCHIE,
Defendant in Error.

No. 2165.

WRIT OF ERROR TO THE UNITED STATES
DISTRICT COURT FOR THE TERRITORY
OF ALASKA, THIRD DIVISION.

HON. E. E. CUSHMAN, *Judge.*

BRIEF OF DEFENDANT IN ERROR.

JOHN B. VAN DYKE,
JOSIAH THOMAS,
JOHN LYONS,
T. P. GERACHTY,

Attorneys for Defendant in Error.

812-816 Lowman Building,

Seattle, Wash.

FILED

SEP - 7 1912

IN THE
UNITED STATES CIRCUIT
COURT OF APPEALS

IN AND FOR THE NINTH CIRCUIT

CHOEMON KIKUCHI,

Plaintiff in Error,

VS.

E. E. RITCHIE,

Defendant in Error.

No. 2165.

WRIT OF ERROR TO THE UNITED STATES
DISTRICT COURT FOR THE TERRITORY
OF ALASKA, THIRD DIVISION.

HON. E. E. CUSHMAN, *Judge.*

BRIEF OF DEFENDANT IN ERROR.

STATEMENT OF THE CASE.

The defendant in error, who is an attorney and counselor-at-law, and proctor in admiralty, instituted this action against the plaintiff in error, who was the owner of a certain schooner, known as Tokai Maru, to recover damages for breach of written contract of employment to render legal services. This contract was made and entered into by the defendant in error with the agent of

the plaintiff in error, Matsutaro Numazaki on November 12th, 1910, and his authority to make it is admitted. (P. R., 12.) The said contract provided, *inter alia*, that the master of said schooner, who was the agent of plaintiff in error, retained the defendant in error as proctor and attorney for said schooner, and her captain, officers and crew *in all matters* arising out of an alleged law violation. It then went on to state the nature of the services to be rendered in the District Court of Alaska, to-wit, to appear as proctor in admiralty to resist the forfeiture of said schooner, and to undertake to secure the discharge of said captain and crew, who were then confined in the Federal jail at Valdez, Alaska, under an alleged conviction and commitment for violation of the fishing law. Provision was also made for the contingent compensation which the said defendant in error was to receive for his services, and the contract concluded with the following sentence:

“If the forfeiture case goes to the Appellate Courts, said attorney is to receive such further compensation as may be agreed on with the owner.” (P. R., 6, 7.)

Pursuant to this contract the defendant in error fully performed the services required of him as enumerated therein. He had the default there-

tofore entered in the case set aside, tried it in the United States District Court of Alaska, and instituted *habeas corpus* proceedings to test the legality of the fines before the commissioner.. (P. R., 28, 45, 46.) The plaintiff in error by his answer admits the full and complete performance of said services. (P. R., 13.) The defendant in error stood ready, able and willing at all times after the final decree was entered in the District Court to prosecute an appeal therefrom, but was prevented from doing so by his client, who employed for that purpose another attorney. (P. R., 37, 38, 39, 40.) Having been prevented by plaintiff in error from fully complying with the said contract of employment, the plaintiff in error brought this action. A trial was had before a judge and jury, the result being that a verdict was returned for the defendant in error, assessing his damages at the sum of Eight Hundred Dollars and costs. (P. R., 103, 106, 107.) The plaintiff in error filed a motion for a new trial, but the same was by the trial court denied. (P. R., 106.) By his writ of error, the plaintiff in error seeks to have the said verdict reversed and for that purpose he submits to this court ten assignments of errors. These assignments of error can all be discussed under two

headings, the first involving the construction of the contract between the defendant in error and plaintiff in error, which was the basis of this action, and the second, the erroneous admission of evidence.

ARGUMENT.

I.

CONSTRUCTION OF THE CONTRACT.

Most of the argument of counsel for plaintiff in error is taken up in a feeble attempt to show that the contract between his client and defendant in error provided only for the services to be rendered in the United States District Court of Alaska. He ignores entirely the fact that by said contract the defendant in error is retained as proctor and attorney for said schooner, and her captain, officers and crew, *in all matters* arising out of the alleged law violation. The contract does not limit the services to be rendered to appearances in said District Court, but provides for the contingency of an appeal for which the defendant in error is to receive such further compensation as may be agreed on with the owner. This contract is clear and unambiguous and does not require a wide knowledge of law to construe it. The plaintiff in error contends that this last paragraph was placed by the defendant in error in the contract for his

own protection, but he does not attempt at any time to show that said contract was unfair and inequitable. It must have been within the contemplation of the parties at the time this contract was made that should the District Court of Alaska rule against the contention of the plaintiff in error, an appeal should be taken to a higher court. It is not optional with the plaintiff in error to employ defendant in error to conduct said appeal, but he has already employed him by said contract. The only matter remaining unsettled is that of compensation. It is a well established rule of law that in construing a contract, the intention is to be collected not from detached parts of the instrument, but from the whole of it, and all parts of the writing and every word in it will, if possible, be given effect. What right has the plaintiff in error in this case to disregard entirely that portion of said contract which relates to services in the Appellate Court? According to the testimony of the defendant in error, the agent of the plaintiff in error, after the trial in the District Court, led him to believe that the case should be appealed, and that he was to go through with it under his contract. (P. R., 29, 33.) Two months elapsed before the defendant in error was notified that his services

were no longer needed. This information was contained in a typewritten letter addressed by the agent of the plaintiff in error and master of said schooner, M. Numazaki, to E. E. Ritchie, defendant in error, at Valdez, Alaska. This letter seems to be in answer to a letter written by Mr. Ritchie to the Japanese consul at Seattle, and was signed by the captain and master of the boat in English, although Mr. Ritchie testified that he did not write English and he could not have signed it. (P. R., 37, 38, 39.) Neither in said letter nor in the entire record is it anywhere claimed that the services of Mr. Ritchie were not satisfactory in the trial court. He is told that he has done his best in the trial court and the court ruled against him. An attempt is made in said letter to show that the matter of appeal in the cause is to be subject to future contract or arrangement. It cannot be seriously contended that the plaintiff in error had the right under the written contract to employ other counsel to prosecute an appeal in this case without giving the defendant in error an opportunity to do so, providing his compensation was satisfactorily adjusted. If the parties had failed to reach an amicable agreement regarding compensation for services upon appeal, then there might be some

reason for claiming that the plaintiff in error had the right to employ other counsel. In view of the fact, however, that Mr. Ritchie at all times was able, ready and willing to perform the services required of him to take the case up on appeal pursuant to his written contract, and had notified the agent of his client that if he had any doubt as to his ability, or it being advisable for him to try to carry it through alone as it had been lost in the lower court, and he desired to get somebody outside, it would be entirely agreeable for the agent to do so, except that he wanted to have some choice in naming the man (P. R., 33, 34), the plaintiff in error could not and should not be allowed to stop performance except subject to liability of responding in damages to the defendant in error for breach of his contract. We concede that the plaintiff in error had this right to stop performance of the contract at any point before its full accomplishment, but he was subjecting himself to the liability for such damages as are recoverable at law for the breach of his contract.

The rule applicable to this class of cases, where a client interferes with the full performance of a contract by his attorney, as deduced from the ad-

judicated cases, is set forth in 4 Cyc., 991 (C), as follows:

"Where, however, the attorney agrees not to charge any fee unless successful, it has been held that he may recover a reasonable value for services rendered in cases where the client interferes to prevent success. Where the agreement is for a percentage of the recovery, and the client compromises for less than the face of the claim, the attorney is at least entitled to his proportion of the sum compromised for and the client's act amounts to a waiver of any requirement that the full amount be collected."

And again in 9 Cyc., 688, the following rule is laid down as to the remedy in case full performance is prevented by the client:

"According to the great weight of authority if a special agreement has been performed in part by the plaintiff, and its further performance has been prevented by the act of the defendant, the plaintiff may at his option either sue for the breach and recover damages or abandon the contract altogether and recover upon a general *indebitatus assumpsit*."

French vs. Cunningham et al, 49 N. E. 797 (Ind.).

Brodie vs. Watkins, 33 Ark. 545; 34 Am. Rep. 49.

Craddock vs. O'Brien, 37 Pac. 896 (Cal.).

Mug vs. Ostendorf, 96 N. E. 780 (Ind.).

Hochster vs. De Latour, 20 E. L. & Eq. 157.

Howard vs. Daly, 61 N. Y. 362; 19 Am. Rep. 285.

Baldwin vs. Bennett, 4 Cal. 392.

Coffee vs. Meiggs, 9 Cal. 363.

Kersey vs. Garton, 77 Mo. 645; 16 C. L. J. 472.

Bartlett vs. Odd Fellows Svgs. Bank, 21 Pac. 743. (Cal.)

Weeks, on Attorneys at Law, Sections 334, 366.

The plaintiff in error contends that the trial court erred in instructing the jury as follows:

“This contract provides that Mr. Ritchie is employed in all matters arising out of this alleged law violation by this schooner and mentions further on in the contract that in case the case is carried to the Court of Appeals, or appealed, that he shall be paid such amount as is agreed upon by the owner. Now, that contract contemplated that Mr. Ritchie, if the case went to the Court of Appeals, that he should represent the owner in the Court of Appeals.”

And in failing to instruct it as follows:

“The jury are instructed that there is nothing in the contract in suit which obligated the plaintiff to render services to the defendant in any Appellate Court, and that, therefore, the contract did not obligate the defendant to continue the plaintiff's employment in the proceedings mentioned in the contract beyond the termination of those proceedings in the District Court, and the defendant's failure to employ the plaintiff in the Appellate Court in connection with those proceedings was not a breach of the contract sued in this action.”

We respectfully submit that at the time the contract between Mr. Ritchie and the master of the schooner was made, it was within the contempla-

tion of the parties that Mr. Ritchie should prosecute the appeal. To deprive him of this right would not be carrying out the spirit of said contract. The plaintiff in error knew at the time the contract was made that if the forfeiture case went to the Appellate Court, Mr. Ritchie was to act as the attorney, and his compensation was to be agreed upon. The law charged him with knowledge that if he breached the contract, he would have to pay the damages sustained by Mr. Ritchie. Mr. Ritchie testified that before this contract was signed, he went to see the captain of the schooner two or three times, and talked to him through an interpreter whose name is signed to the contract as a witness, and he was also a member of the crew and capable of speaking good English; that after they had arrived at an agreement as to the contract the memorandum was drawn up and was read to the captain by the interpreter, W. Kino, and then signed. (P. R., 24, 25.) Charles G. Wolf, a witness for the plaintiff, corroborated Mr. Ritchie's testimony in this respect. (P. R., 56, 57.)

A careful examination of the following authorities we are confident will convince this honorable court that the correct rule of law in a case

of this character is contained in the instruction hereinbefore mentioned and given to the jury and not in the instruction requested by the plaintiff in error, and which the court refused to give.

“In the absence of disturbing events, the employment of an attorney continues as long as the suit or business upon which he is engaged is pending, and ordinarily comes to an end with the completion of the special task for which the attorney was employed.”

4 Cyc., 952.

Smith vs. Cunningham, 59 Kan. 552; 53 Pac. 760.

Bathgate vs. Haskin, 59 N. Y. 533.

Sturgiss vs. Dart, 23 Wash. 244; 62 Pac. 858.

Watson vs. Grays Harbor Brick Co., 3 Wash. 283.

An attempt has been made by counsel for plaintiff in error to minimize the services rendered in connection with the appeal by Mr. Ritchie. Mr. Ritchie himself does not attach any importance to the work which he did after the signing of the final judgment by the District Court. They simply showed the attorney's willingness to perform his contract. (P. R., 34-37, 54.) He is not seeking to recover upon a *quantum meruit* for services actually performed, but for damages for breach of written contract of employment. This is the the-

ory upon which the case was tried as well as of the court's instructions to the jury. (P. R., 91-97.) It is true that the complaint might lead one to believe Mr. Ritchie sought to recover the reasonable value of his services, in addition to the services which he was willing to and would have performed had he not been prevented by its breach by the plaintiff in error, but in his testimony, all evidence pertaining to recovery upon a *quantum meruit* was excluded and the complaint will be considered as having been amended upon the trial in that respect. The question submitted to the jury to determine, was whether or not the plaintiff in error breached his contract with the defendant in error, and if so, what were the damages recoverable by the defendant in error. In the light of the cases hereinbefore cited, the defendant in error could not recover upon a *quantum meruit* because his services were contingent upon a certain result in the trial court. Mr. Ritchie's right to recover compensation rests upon the breach of the contract and not upon the value of his services actually rendered. It is true that he did render valuable services for his client, but that alone would not entitle him to compensation under his contract. The plaintiff in error discharged him without cause, giving as an excuse

that the expense of having him come to San Francisco would be prohibitive. (Plaintiff's Exhibit "C," P. R., 39.) Mr. Ritchie testified that he explained to the captain through the interpreter and his supposed agent, that he was going to San Francisco on another case, which would come up at the May term of court, of the Court of Appeals at San Francisco, so that he would not charge him anything for traveling expenses, because he was going down any way. He also testified that the Phillips case in which he appeared at San Francisco was set for the 15th of May. The Tokai Maru case, in which defendant in error was employed by the plaintiff in error, was argued on the 23rd, and was so set down on the calendar. He left six days before it was heard, but he could not have remained if he had been on the case. (P. R., 41.) Had the plaintiff in error any just cause for discharging Mr. Ritchie as his attorney in the Tokai Maru case, he might have been justified in discharging him, but the entire record before the court fails to show any evidence whatever that the plaintiff in error considered him incompetent or incapable of looking after the case properly. Under these circumstances we contend that the plaintiff in error breached his contract with defendant

in error at his peril, and he should be held liable for the consequences.

It is contended by the plaintiff in error that the retainer of an attorney for the defendant at common law terminates with a judgment against his client, and he cites certain cases to support this proposition. None of these cases are in point for the reason that they simply hold that after judgment, the authority of the attorney, in so far as the service of any further papers in the case is concerned, has been terminated. Attempts were made in said cases to serve certain papers upon the attorneys who had appeared for defendants, against whom judgments had been rendered, and the courts held that there was nothing further to be done in the cases by the defendants except to pay the judgments. Of course, if steps were taken by the attorneys for said defendants to appeal the cases, service of papers in that behalf could be made. Some of the cases cited, provide for the lapse of a certain time after judgment before the authority of the attorney ended.

II.

THE ALLEGED IMPROPER ADMISSION OF EVIDENCE.

The plaintiff in error feels aggrieved because

the trial court permitted the defendant in error to testify to conversations leading up to and preceding the written contract in suit. (P. R., 31-33.) This testimony is also set out in the fourth assignment of error. It was not introduced for the purpose of contradicting any of the terms of the written contract but to prove collateral and independent facts about which the writing is silent. This is always permissible.

Hannah vs. Shirley, 7 Ore. 115.

17 Cyc. 638 *et seq.*

Windsor vs. St. Paul, etc., R. Company, 37 Wash. 156; 79 Pac. 613.

Parol evidence is admissible to supply a date in an acknowledgment of a debt.

Manchester vs. Brodner, 107 N. Y. 349.

To show the purpose of certain minor stipulations.

Equator Co. v. Gunella (Colo.) 33 Pac. 613.

To fix the time of performance.

Sivers vs. Sivers, (Cal.) 32 Pac. 571.

To show a parol contract or a conversation referred to in the writing.

York vs. Beach, 129 N. Y. 621.

Under the contract in this case Mr. Ritchie was employed to act *in all matters* arising out of an alleged law violation, including the prosecution of an appeal. His compensation, however, for the

services last named was not fixed but was left to a subsequent agreement, and it was competent for him to testify to matters upon which the contract was silent.

It is of no avail to the plaintiff in error at this time to bemoan because he was represented by a sea captain who was unable to speak a word of English, and obliged to speak through an interpreter with one speaking the language of the country and supposed to be trained in its laws. He does not charge that said contract was signed under a mistake, or that any misrepresentations were made to him, or that fraud was practiced upon him. The entire record shows that the contract between Mr. Ritchie and the plaintiff in error was in every way just and equitable.

In conclusion we respectfully submit that no error was committed by the trial court in this case either in its instructions to the jury construing said contract, or in the admission of testimony, and its judgment should be affirmed.

Respectfully submitted,

JOHN B. VAN DYKE,
JOSIAH THOMAS,
JOHN LYONS,
T. P. GERACHTY,

Attorneys for Defendant in Error.

United States
Circuit Court of Appeals
For the Ninth Circuit

M. A. PHELPS LUMBER COMPANY, a Corporation,
ation,

Plaintiff in Error,

vs.

McDONOUGH MANUFACTURING COMPANY,
a Corporation,

Defendant in Error.

Transcript of Record

Upon Writ of Error to the United States District Court
for the Eastern District of Washington
Northern Division

RECEIVED

FILED

AUG 5 - 1912

AUG 27 1912

F. D. MONCKTON,
CLERK

No. _____

United States
Circuit Court of Appeals
For the Ninth Circuit

M. A. PHELPS LUMBER COMPANY, a Corporation,
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Plaintiff in Error,

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Upon Writ of Error to the United States District Court
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Northern Division

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NO. -----

M. A. PHELPS LUMBER COMPANY, a Corporation,

Plaintiff in Error,

vs.

McDONOUGH MANUFACTURING COMPANY, a Corporation,

Defendant in Error.

NAMES AND ADDRESSES OF ATTORNEYS.

Attorneys for Plaintiff in Error.

DANSON, WILLIAMS AND DANSON, The Paulsen Building, Spokane, Washington.

Attorneys for Defendant in Error.

McCARTHY & EDGE, The Hyde Building, Spokane, Washington.

DOCKETED.

UNITED STATES OF AMERICA.

In the Circuit Court of the United States, Eastern District of Washington.

McDONOUGH MANUFACTURING COMPANY, a Corporation,

Plaintiff,

vs.

M. A. PHELPS LUMBER COMPANY, a Corporation,

Defendant.

Action brought in the said Circuit Court, and the Complaint filed in the office of the Clerk of said Circuit Court

in the City of Spokane, County of Spokane, State of Washington.

McCARTHY & EDGE,

Plaintiff's Attorneys.

SUMMONS.

The President of the United States of America, Greeting: To M. A. Phelps Lumber Company, a Corporation.

You are hereby summoned to appear in the Circuit Court of the United States, for the Eastern District of Washington, at the City of Spokane, Wash., within twenty days after service of this summons, exclusive of the day of service, and defend the above-entitled action in the Court aforesaid; and in case of your failure so to do, judgment will be rendered against you, according to the demand of the complaint, now on file in the office of the Clerk of said Court, a copy of which complaint is herewith served upon you.

WITNESS, the Honorable EDWARD D. WHITE,
Chief Justice of the United States, and the seal of
said Circuit Court, this 24th day of October, 1911.
(Seal.)

(Signed) FRANK C. NASH, Clerk.

UNITED STATES OF AMERICA,
Eastern District of Washington—ss.

I hereby certify and return that I have personally served the within summons, together with the complaint in the within entitled action, upon the within named defendant by delivering to and leaving a true copy of the said summons and complaint with M. A. Phelps, presi-

dent of the M. A. Phelps Lumber Co., at Spokane, on Oct. 25, 1911.

(Signed) W. A. HALTEMAN,
United States Marshal.

(Signed) By A. M. DAILEY,
Deputy.

Oct. 25, 1911.

Endorsements: Summons. Filed Oct. 25, 1912.

FRANK C. NASH, Clerk.

In the Circuit Court of the United States, for the Eastern District of Washington, Eastern Division.

NO. 1586.

AT LAW.

McDONOUGH MANUFACTURING COMPANY, a
Corporation,

Complainant,

vs.

M. A. PHELPS LUMBER COMPANY, a Corporation,
tion,

Defendant.

DECLARATION.

The McDonough Manufacturing Company, a corporation, organized and existing under the laws of the State of Wisconsin, and having its principal place of business at Eau Claire, in said State, and a citizen, resident and inhabitant of said State, plaintiff in this suit, complains of the M. A. Phelps Lumber Company, a corporation, organized and existing under the Laws of the State of Washington, and having its principal place of business at Spokane, Washington, and a citizen, resident

and inhabitant of the Eastern District, Eastern Division of Washington, aforesaid, and says:

I.

That the plaintiff is now, and at all times herein mentioned has been, a corporation, organized and existing under the Laws of Wisconsin, with principal place of business at Eau Claire, Wisconsin, and a resident, citizen and inhabitant of said place, and that the defendant, M. A. Phelps Lumber Company, is now, and at all times herein mentioned has been, a corporation, organized and existing under the Laws of Washington, with principal place of business at Spokane, Washington, and a resident, citizen and inhabitant of said place.

II.

That on or about May 10, 1911, at Spokane, Washington, said defendant made and executed a certain promissory note, in writing, bearing date on said day, in words and figures as follows, to-wit:

“\$1,173.50 Spokane, Washington, May 10, 1911.

Three (3) months after date, for value received, we promise to pay to the order of McDonough Manufacturing Company, Eau Claire, Wisconsin, Eleven Hundred Seventy-three & 50/100 (\$1,173.50) Dollars with interest at the rate of seven (7) per cent per annum from date until paid.

Payable at Spokane & Eastern Trust Company, Spokane, Washington.

This original note is subject to extension by two (2) separate renewals of like tenor as to principal only, ag-

gregating a total credit of nine (9) months' time from the date hereof.

(Signed) M. A. PHELPS LUMBER COMPANY,

By M. A. Phelps, President."

and then and there delivered said note to plaintiff.

III.

That thereafter and on or about their hereinafter stated respective dates, said defendant likewise executed and delivered to plaintiff its certain (4) other and different promissory notes and which were similar in words, figures and tenor as said first described note, except that they were dated, respectively, May 15, 1911, May 17, 1911, May 24, 1911, and July 20, 1911, and that the principal thereof, respectively, were as follows, to-wit: \$701.19, \$842.75, \$1,190.75, \$592.05, and that the first described thereof provided for three renewals and for a total credit aggregating one year's time.

IV.

That plaintiff is now, and at all times since has been, the owner and holder of each and all of said notes.

V.

That at Spokane, Washington, on October -----, 1911, and at times prior thereto, the plaintiff in accordance with the terms of said notes presented same to the defendant and demanded in the alternative thereof in accordance with the terms of said note, and that said defendant then and there refused to pay said notes and each and all of them, and refused to execute renewals or extensions thereof, and of each and all of them.

VI.

That there is due and owing plaintiff on said notes the principal sum of Forty-five Hundred and 24/100

Dollars (\$4,500.24), with interest at seven per cent per annum thereon as follows, to-wit:

On \$1,172.50 from May 10, 1911; on \$701.19 from May 15, 1911; on \$842.75 from May 17, 1911; on \$1,190.75 from May 24, 1911, and on \$592.05 from July 20, 1911.

WHEREFORE, plaintiff prays that it may have judgment against the defendant for the sum of Forty-five Hundred and 24/100 Dollars (\$4,500.24), with interest thereon at seven per cent per annum as follows:

On \$1,172.50 from May 10, 1911; on \$701.19 from May 15, 1911; on \$842.75 from May 17, 1911; on \$1,190.75 from May 24, 1911, and on \$592.05 from July 20, 1911, together with its costs and disbursements herein, and that plaintiff be given such other, further and different relief as to the Court may seem just.

(Signed) McCARTHY & EDGE,

Attorneys for Plaintiff.

UNITED STATES OF AMERICA,

STATE OF WISCONSIN,

County of Eau Claire—ss.

J. W. Hubbard, being first duly sworn, upon oath, says: that he is the President of the McDonough Manufacturing Company, the above-named corporation, plaintiff, and makes this verification for and on its behalf; that he has read the foregoing declaration, knows its contents, and that the matters and things therein contained are true as he verily believes.

(Signed) J. W. HUBBARD.

SUBSCRIBED and sworn to before me this 20th day of October, 1911.

(Signed) MARGARET W. RIPLEY,
NOTARY PUBLIC for Wisconsin, residing at Eau
Claire, Wisconsin.

(Seal of Notary.)

Endorsements: Declaration. Filed Oct. 24, 1911.

FRANK C. NASH, Clerk.

DOCKETED 11/29/11

SERVED 11/29/11

*In the Circuit Court of the United States, for the East-
ern District of Washington, Eastern Division.*

AT LAW.

McDONOUGH MANUFACTURING COMPANY,
Complainant,

vs.

M. A. PHELPS LUMBER COMPANY, a Corpora-
tion,

Defendant.

DEMURRER.

Comes now the defendant and hereby demurs to the declaration of plaintiff herein, and as ground for demurrer alleges:

1. That plaintiff has no legal capacity to sue.
2. That the complaint or declaration does not state facts sufficient to constitute a cause of action.

(Signed) DANSON, WILLIAMS & DANSON,
Attorneys for Defendant.

Endorsements: Demurrer.

Received a copy of the within demurrer at Spokane, Wash., this 29th day of Nov. 1911.

McCARTHY & EDGE,
Attorneys for Plaintiff.

Filed Nov. 29, 1911.

FRANK C. NASH, Clerk.

AND AFTERWARDS, to-wit: on the 4th day of December, 1911, at a stated term, to-wit; the September, 1911, Term of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Eastern District of Washington, Eastern Division, held at the court room in the City of Spokane, Present, the Honorable FRANK H. RUDKIN, United States District Judge, the following proceedings were had in said case, to-wit:

In the Circuit Court of the United States for the Eastern District of Washington, Eastern Division.

No. 1586.

MCDONOUGH MANUFACTURING COMPANY, a
Corporation,

Plaintiff,

vs.

M. A. PHELPS LUMBER COMPANY, a Corporation,
tion,

Defendant.

ORDER OVERRULING DEMURRER TO COMPLAINT AT LAW.

Now, at this day, the demurrer of the defendant herein to the complaint at law of the plaintiff, came on regularly for hearing, the plaintiff appearing by its attorneys, McCarthy & Edge, and the defendant appearing by its at-

torneys, Danson, Williams & Danson, and after argument of respective counsel, and the court being fully advised in the premises, it is ORDERED that said demurrer to said complaint at law, be, and the same is hereby, overruled. Defendant excepts and its exception is allowed.

(Signed) FRANK H. RUDKIN,
Judge.

Entered in U. S. Circuit Court Journal No. 7 at page 130.

In the Circuit Court of the United States for the Eastern District of Washington.

AT LAW.

NO. 1586.

McDONOUGH MANUFACTURING COMPANY, a
Corporation,

Complainant,

vs.

M. A. PHELPS LUMBER COMPANY, a Corporation,
tion,

Defendant.

AMENDED ANSWER.

Comes now the defendant, M. A. Phelps Lumber Company, and for amended answer to the complaint herein:

1. Admits all of paragraph 1 of the complaint with the exception that this defendant has no knowledge or information sufficient to form a belief as to whether said complainant is incorporated under the laws of the State of Wisconsin or whether its principal place of business is at Eau Claire, Wisconsin.

2. Admits paragraph 2 of the complaint.

3. Admits the allegations contained in paragraph 3 of the complaint except that this defendant denies that all of the provisions and conditions of the notes therein mentioned are shown by the allegations of said paragraph, and denies that any of said notes by their terms were to become due in three months after date.

4. That this defendant has no knowledge or information sufficient to form a belief as to any of the allegations contained in paragraph 4 of the complaint and denies the same.

5. Denies each and every allegation, matter and thing in paragraph 5 of said complaint contained except that this defendant admits that said notes were presented to defendant and demand made that defendant execute new notes, which this defendant refused to do.

6. Denies each and every allegation, matter and thing in paragraph 6 of the complaint contained and particularly denies that any sum whatsoever is due on any of said notes.

I.

For a further, separate and affirmative answer and defense and by way of counter claim, this defendant alleges:

1. That prior to September 15, 1910, this defendant entered into negotiations with the complainant, McDonough Manufacturing Company, for the furnishing to this defendant of all the machinery complete for a single band saw mill with all belts and bar iron necessary for the transfers, conveyors and log jacker, also for all steam piping, two sets of saws for all machinery except slasher and one set of saws for the slasher, all of said

machinery to be of the same type as had been previously installed by said McDonough Manufacturing Company in the Lane Mill Company's mill at Harrison, Idaho, and also all necessary valves and piping necessary in connecting up all the water and steam appliances of every kind including all exhausts, whistles and blow-off pipes, all valves to be of approved make, also to include all necessary valves and piping for disconnecting one boiler from the others so that the boilers could be used independently, and to furnish all plans and details for the installation of said machinery and all metal of every nature and kind for the completion of the mill except nails and spikes, all boxes to be furnished planed at the back side thereof.

2. That on Sept. 15, 1910, complainant and this defendant had not been able to work out the details in full of the contract nor to agree upon all the terms and conditions and it was agreed orally between complainant and defendant that thereafter as soon as the details could be worked out and complainant and this defendant reach a complete understanding, a formal written contract would be prepared in writing and executed by both complainant and defendant. That for the purpose of evidencing such portions as had already been agreed upon and none other, a memorandum in writing should be signed by the parties and, pursuant thereto, a preliminary memorandum or contract was on said day entered into between complainant and this defendant, as shown by Exhibit A attached hereto and made a part hereof. That a copy of said written memorandum was delivered to complainant and is now in its possession. That at said time it was

orally agreed that as soon as the parties could come to an understanding as to all matters involved in the contract, a formal written contract should be drawn and executed so evidencing the same.

3. That thereafter and on or about Nov. 4, 1910, complainant and this defendant did agree upon the details and terms of the said contract whereby the said complainant agreed to furnish all the material and to perform all of the things and conditions mentioned in paragraph 1 of this affirmative defense and counterclaim for the consideration of \$18,750.00 to be paid complainant, and that the said plans and specifications and the details for the installation of the machinery should be furnished forthwith and that the contract complete should be performed within a reasonable time and at a date not later than Mar. 15, 1911, and that there should be included in the machinery furnished, should defendant desire, and delivered within the same time, but at an extra charge, one or two extra boilers with all fittings and connections.

4. That the said agreement was entirely oral except as shown by said preliminary agreement hereinbefore mentioned and certain general specifications in which was included the provisions shown by Exhibit B attached hereto and made a part hereof, a copy of which general specifications and said Exhibit B above mentioned was delivered to and is now in the possession of complainant, and also except as shown by letters written by complainant to this defendant and letters written by this defendant to complainant; that the originals or cop-

ies of said letters were delivered to complainant and are now in complainant's possession.

5. That thereafter and on or about December 1, 1910, defendant orally contracted with complainant to furnish one extra boiler together with the connections, fittings, casings and all other equipment necessary to change the installation of boilers in said mill from a battery of two to a battery of three, and employed complainant to install all three of said boilers and agreed to pay therefor \$750.00 for the installation and setting of said boilers and the reasonable value of such extra boiler and fittings and connections, which reasonable value was the sum of \$1,925.00. That complainant agreed to furnish and install the said boilers within a reasonable time and not later than March 15, 1911.

6. That a reasonable time for complainant to have fully performed its contracts would have been not to exceed three months.

7. That this defendant was at said time engaged in a general lumber and timber business and was planning, with said saw mill so to be installed as aforesaid with machinery to be furnished by complainant to start the manufacture of lumber with said mill on or before May 1, 1911, the said saw mill to be so erected near Cusick, Washington, and had complainant performed its said contract, the said mill would have been fully completed and ready for operation on or before said May 1, 1911, and said mill would have had a capacity of 55,000 feet of lumber day shift and 50,000 feet of lumber night shift. That in order to prepare for operating said mill in 1911, it was necessary that defendant should imme-

diately start, after the making of said contract with the complainant, to procure logs from its own lands and to purchase from others and to have the same delivered at its mill in the spring of 1911 when the same could be driven to its said mill on floatable streams; that unless the logs were so driven during the spring season they could not be delivered later in the season so that they could be manufactured with profit into lumber; that in order to manufacture lumber properly in the vicinity in which said mill is located, it is necessary that the same be cut and become seasoned before placing the same on the market, and at the place where said mill was erected, the season for cutting logs into lumber is from about the 1st day of March to the 15th day of September; that unless the lumber is cut before the 15th of September it cannot be seasoned so as to be marketed that year or prior to June 1st of the succeeding year and any lumber cut after said time must be carried over until such time in the following year and will be greatly damaged by reason of bluing and will greatly deteriorate in value.

8. That in anticipation of the performance of said contract by complainant and of having said mill ready for operation by May 1st, defendant forthwith, upon the making of said contract, proceeded to obtain logs for its said mill and had the same driven to its said mill or near such place to the amount of 6,000,000 feet on or before May 1, 1911, all of which would have been cut and manufactured into lumber during the said season of 1911 had the complainant complied with its said contract; but by reason of the default of complainant, as hereinafter alleged, this defendant was only able to cut into lumber,

during the season, about 2,100,000 feet of said logs and as a result of complainant's default, the remainder of said logs, to-wit: 3,900,000 feet, were left to be carried over by defendant until the commencement of the season for operating said mill of 1912, and to about March 1, 1912; that in the said logs which defendant must carry over, it has invested in the purchase thereof from others and in the expense of cutting and carrying the same to or near defendant's said mill more than \$20,000.00 and defendant has lost the interest on said investment for six months to defendant's damage in the sum of \$600.00; that said logs will deteriorate in value, by reason of being held waiting to be sawed, from becoming water soaked and sinking in the river or escaping, to the amount of \$2,500.00, all of which damage defendant will suffer by reason of the said default of complainant.

9. That the market for lumber in the fall of 1910, when the said contract was made, was good and lumber at the prices which could then be obtained could be manufactured and sold at a large profit and the said prices and demand for lumber continued until in the summer of 1911, but immediately thereafter fell off at least \$2.00 per thousand feet and at all times since the market price for lumber has been so depreciated; that complainant knew that the market price of lumber was liable to fluctuate and go down and that it was the intention, at the time said contract was made, by reason of the favorable prices, to contract its mill run of said lumber for the season of 1911 before starting the mill on May 1, 1911, all of which was known by complainant at the time the said contract was made; that by reason of the default of

complainant as hereinafter alleged, this defendant was not able to begin sawing lumber until about July 15, 1911, and during the sawing season then was only able to saw 2,100,000 of said logs while, had the contract been performed, the entire 6,000,000 feet could have been sawed, and defendant was unable to contract its said lumber by reason of being unable to start the operation of its said mill prior to July 15, 1911, and the uncertainty as to whether it would be able to operate at all during the season of 1911, and by reason of the said facts, lost a profit on the said lumber which it would have manufactured from said logs which would have amounted to 7,500,000 feet, to-wit: damages in the sum of \$15,000.00; that the said decrease in the market value of lumber took place after the time that defendant would have contracted and sold its said mill cut had complainant performed its contract and before defendant could have made its contracts after knowing that complainant would complete its contracts in time so that a partial run could be made during the season of 1911.

10. That complainant failed, neglected and refused to perform its said contract or to furnish the mills or machinery or to install the said boilers within a reasonable time, or within the time fixed by the contract, and did not complete the furnishing of the machinery which it actually did furnish until May 24, 1911, and did not commence to install the said boiler until about June 15, 1911, and after the completion of the furnishing of such part of said machinery as complainant did furnish, it necessarily required forty-five days to get the machinery installed and the mill in operation while, had the said

machinery been furnished as provided by the contract, the mill would have been ready for operation by May 1, 1911, when, by reason of the said default of complainant, it was not ready until July 15, 1911.

11. That complainant, in performing its said contract so far as it was performed, would ship and furnish to this defendant odds and ends of said machinery at the same time, but without completing the shipment of any particular class of machinery covered by the contract and which was to be installed, or furnish to defendant machinery in the order in which it would be first needed or could be used in installing the same, and as a result there of, much of said machinery would be received with many essential parts thereof lacking, and defendant, in attempting to install said machinery and after going to great expense in so doing, would find that said machinery could not be installed at said time by reason of the absence of parts thereof which complainant had neglected and failed to send and, as a result thereof, defendant was put to much extra expense in the hire of help for the installation of such machinery and inability to use the said machinery by reason of the said default of complainant and, as a result thereof, suffered damage in the sum of \$1000.00, the items of such parts not furnished or where furnished incomplete, so far as defendant can furnish same at this time, being shown by Exhibit C hereto attached and made a part hereof and Exhibit D to D9.

12. That notwithstanding the said contract as aforesaid, the complainant failed, neglected and refused to furnish a large portion of the machinery and equipment

contracted for, consisting of shafts, key-seating slasher shaft, bar iron, bolts, washers, steam pipe and water appliances and fittings, and other incidentals necessary in order to complete the said machinery, exhaust, whistles, blow-off pipes and necessary valves and which were included in the contract, and this defendant, in order to obtain same and to complete said contract, was required to purchase elsewhere and to cut, manufacture and fit the same, and this defendant further made certain advances to complainant through its representatives for which it has not received credit, the entire items mentioned in this paragraph aggregating \$2400.00 after deducting all credits, a statement of said items, so far as defendant can furnish same at this time, being shown by Exhibit D 1 to 9 hereto attached and made a part hereof.

13. That complainant failed and neglected to furnish said boxes planed at the back side as provided by the contract, and the difference between the values as furnished and the boxes planed as provided by the contract was the sum of \$100.00.

14. That complainant failed, neglected and refused to complete its contract or to furnish certain of the materials called for thereby, consisting of iron for log haul conveyors and other conveyors and transfers included in said mill, also refuse conveyors for the cut-off saw, of which the reasonable value was \$650.00, and the equipment for the filing room was not completed in that the centering mandrel, of the reasonable value of \$25.00, was not furnished; that the steam pipes furnished had not been threaded or cut in the proper lengths, and this

defendant necessarily incurred expense in the sum of \$300.00 in remedying said defects; that the band wheel furnished by complainant was in a defective condition, the spokes thereof being loose and untrue and the circumference thereof being untrue, rendering the same unsafe for use and of the value of \$175.00 less than provided by the contract, and defendant necessarily incurred said amount in expense in correcting such defect.

15. That complainant, at the time said contract was entered into, had full knowledge and notice of all of the facts stated in this counter-claim and of the purpose which defendant had in the constructing of said sawmill, when defendant planned to use the same, and of all of the damages herein alleged which would accrue to defendant as a result of a breach of said contract, and a reasonable time for the furnishing of any extras which complainant may have furnished after being ordered by defendant was not to exceed thirty days from the time of such order, and had complainant performed its contract, said mill would have been fully ready for operation by May 1, 1911.

16. That through the said defaults of complainant this defendant lost the use of its said property and its said mill for the period of two and one-half months, the reasonable value of which was the sum of \$60.00 a day, all to this defendant's damage in the sum of \$3750.00; that this defendant suffered damage by being unable to manufacture and market its lumber as above alleged in the sum of \$15,000.00; suffered damages in the sum of \$600.00 by reason of being compelled to carry over 3,900,000 feet of saw logs until the spring of 1912; suf-

ferred and will suffer damages in the sum of \$2500.00 by reason of depreciation, deterioration and loss of saw logs which must be carried over until the spring of 1912; suffered damages in the sum of \$1000.00 by reason of the complainant furnishing the machinery that was furnished in a defective and incomplete condition, and the extra expense which defendant incurred by reason thereof; suffered damages in the sum of \$300.00 for the failure of complainant to furnish plans and details; is entitled to additional credit and suffered damages in the sum of \$2400.00 by reason of the failure of complainant to furnish certain portions of machinery contracted for and the items referred to in paragraph 13 above; suffered damages in the sum of \$100.00 by reason of the failure of complainant to plane the back side of the boxing; is entitled to an additional credit and suffered damages in the sum of \$1150.00 on account of the failure of complainant to furnish the items mentioned in paragraph 14 above and the expense incurred by defendant for the items therein mentioned; all to defendant's damage and for which it is entitled to a credit herein in the sum of \$26,800.00.

17. That the said notes described in the complaint herein were given on account of said contract for the purchase of said machinery and the consideration for said notes has failed by reason of the said default of complainant and the damages suffered as herein alleged. That in addition to the said contract price for machinery to be furnished this defendant afterwards and prior to January 1, 1911, ordered certain extras and the installation of certain of said extras being boiler and in-

stallation as above stated of the reasonable value of \$2902.13 delivered, making a total to which complainant was entitled had it performed its contract in the sum of \$21,652.13, on which this defendant has paid in cash or by the execution of the notes described in the complaint, exclusive of the credits mentioned in this affirmative answer and counter-claim, \$-----

WHEREFORE this defendant prays that complainant take nothing by its said action; that its complaint be dismissed and that this defendant have and recover of and from the complainant, McDonough Manufacturing Company, a corporation, judgment in the sum of \$-----, together with its costs and disbursements herein.

(Signed) DANSON, WILLIAMS & DANSON,

Attorneys for Defendant.

UNITED STATES OF AMERICA,

State of Washington,

County of Spokane—ss.

Personally appeared before me the undersigned, M. A. Phelps, who being first duly sworn, on oath says: That he is the President of M. A. Phelps Lumber Company, a corporation, defendant above named, and makes this verification for and on its behalf; that he has read the foregoing answer and knows the contents thereof and the same is true to the best of his knowledge, information and belief, and that he believes the matters therein contained to be true.

(Signed) M. A. PHELPS.

Subscribed and sworn to before me this ----- day
of February, A. D. 1912.

(SEAL) (Signed) JAS. A. WILLIAMS,
*Notary Public for the State of Washington, Residing
at Spokane.*

EXHIBIT "A."

Spokane, Wash., Sept. 15, 1910.

McDonough Manufacturing Company.

Main Office and Works:

Eau Claire, Wisconsin.

Subject to strikes, accidents or other delays beyond
your control, please ship in good order the following
machinery, delivered F. O. B., Cusick, Wash., or factory
where made about April 1st, 1911, from date of receipt
by you.

Machinery complete for single ba
bar iron necessary for transfers, conveyors and log
jacker, steam piping and two sets of saws for all ma-
chines except slasher which shall have one set. All
machinery to be of same type as Lane Lbr. Company.

Plans to be completed for your approval at Cusick if
desired.

For which we agree to pay within thrity days after
date of shipment Eighteen Thousand Seven Hundred
Fifty and no/100 (\$18,750.00) Dollars with exchange.

The purchaser agrees to make settlement within ten
days after date of shipment and to then evidence all
payments due at a later date, by notes bearing date of
shipment and interest. In case payment is divided, to be
as follows:

Terms to be mutually agreed upon later before shipment.

It is agreed that title to the property mentioned above shall remain in the consignor until fully paid for in cash and that this contract is not modified or added to by any agreement not expressly stated herein, and that a retention of the property forwarded, after thirty days from date of shipment, shall constitute a trial and acceptance, be a conclusive admission of the truth of all representations made by or for the consignor, and void all its contracts or warranty express or implied. The unloading of machinery when received shall constitute a waiver of any claim for damage from delay. No allowance will be made for any change in machinery without the written authority of the McDonough Manufacturing Company. It is further agreed that the purchaser shall keep the property fully insured for the benefit of the McDonough Manufacturing Company.

Ship via, -----

Accepted by

J. W. Hubbard,

M. A. Phelps Lbr. Co.,

Salesman for

McDonough Manufacturing
Company,,

By M. A. Phelps,
Prest.

Subject to approval at the main office,
Eau Claire, Wisconsin.

In presence of,

EXHIBIT "B."

No. 10915.

TERMS: Freight cash on receipt of B/L—one-half

invoice price of each car within five (5) days from arrival of shipment; balance covered by notes running ninety (90) days bearing interest at rate of seven (7) per cent; said notes to be executed and delivered within five (5) days from arrival of each shipment, and each note renewable three times or so as to become ultimately due in one (1) year, except last car, which payments shall be made as above twenty (20) days from arrival of last car.

Shipments to begin February 15, 1911, and be completed about March 15, 1911.

McDonough Mfg. Co.

By J. W. Hubbard,

Prest.

M. A. Phelps Lumber Co.

By M. A. Phelps,

Wm McIntyre.

EXHIBIT "C."

Date of Receipt of Machinery from the McDonough
Manufacturing Company.

Edger, February 21, March 30.

Conveyor for burner, February 4, February 21, March 9
and March 30.

Trimmer, February 21 and March 9th

Slasher, February 21st, February 4th and March 30th.

Log Deck Apparatus, February 4th, February 21st.

Nigger, March 9th and March 30th.

Kicker, February 4th and March 9th.

Steeple top transfer, February 21st, March 30th.

First set live rolls, February 21st, March 9th.

Transfer to edger, February 21st, March 30th.

Second set live rolls, February 21st and March 9th.

Log Jacker, February 4th, February 21st and March 30th.

Boiler room conveyor, February 4th and March 30th.

Saw conveyor, February 4th, March 9th and March 30th.

Hog Conveyor, February 4th, Feb. 21st, March 9th and March 30th.

Lath room conveyor, February 4th, March 9th and March 30th.

Lath mill chain drive, February 21st, March 9th and March 30th.

Engine, April 30th.

Boilers, April 25th, May 10th and May 24th.

The parts lacking and which were supplied by defendant is as shown by Exhibit 2a.

These dates were the dates that the freight was paid, which was the time that the several cars passed Rathdrum, Idaho. The date of arrival at Cusick would be from one to three days later.

Material still lacking to complete contract.

Iron for inside of log slip; Iron for log deck; Iron for main conveyor; Iron for boiler conveyor; Iron for conveyor to boilers; Iron for lath mill conveyor; Refuse conveyor for swing cut-off saw. Part of the conveyor chains arrived in the last car of boiler material.

EXHIBIT "D."

Labor and Material furnished on account of the Machinery Contract with the McDonough Manufacturing Company, as per following statement made by Mr. J. R. Bond.

1911

July 25

Swing shaft for lath tightener, 4 U Bolts_	\$ 1.60
1 Iron bale for same_	1.00
For Bolter tightener, 4 U Bolts_	1.60
1 Iron bale _	1.00
1 Lever and connections for lath mill storage chain _	6.00
4 U Bolts for tightener of the log haul_	1.60
1 Controlling lever for same_	1.50
Counter balance for live skids, rear skids_	2.00
Front skids _	2.00
Lever for first set of live rolls_	5.00
Shotgun feed lever connections_	12.00
Ring to support valves_	4.00
Supposed extra work for setting angle plate on account of its not being planed on back side _	11.00
Adjustment on edger tightener box_	3.00
4 U Bolts for edger tightener_	1.60
4 U Bolts for tightener for lath mill_	1.60
Lever on steeple top transfer drive_	6.00
Work of setting boxes, caused by being made out of line_	2.00
Lever on slasher chain drive_	4.00
Adjustment on trimmer tightener boxes_	1.50

4 U Bolts -----	1.60
Swing shaft for trimmer tightener-----	1.00
2 Swing shafts -----	1.75
8 Eye Bolts -----	3.20
Slasher tightener lever for throwing second set live rolls in and out of gear-----	5.00
Labor smoothing up gears of live rolls so that they would run -----	25.00
Connections for nigger lever-----	8.00
Changing blocks on carriage-----	15.75
Fixing trimmer so that saws would go on--	12.00
Fixing lath bolter so that saws would go on	9.00
Fixing edger -----	17.50
24 Tightener rods -----	12.00
7 Tightener rods on large tightener-----	3.50
Extra work setting slasher boxes caused by not being planed on back side-----	18.50
Lengthening key seat in slasher counter---	4.75
Smoothing up log jacker pinions-----	5.50
Cutting out and leveling up for log jacker on account of back of boxes not being planed	4.75

40 Bolts 1/2x10 1/2"----	50/10/5%	\$ 3.42	
4 Bolts 5/8x25"----		.92	
24 Bolts 5/8x19"----		4.44	
3 Bolts 5/8x23"----		1.08	
24 Bolts 1/2x15 1/2"----		2.67	
14 Bolts 1/2x19"----		1.78	
24 Bolts 1/2x15 1/2"----		2.67	
6 Bolts 3/8x 6"----		.23	
4 Bolts 3/8x 6"----		.15	
		<hr/>	
		\$17.36	7.43

Forward -----\$226.23

Statement made by Mr. J. R. Bond—Continued.

Forward -----			\$226.23
Sawing off end of deck skids-----			4.25
20 Log Screws 1/2x4"-----	70%	\$ 1.11	
6 Bolts 5/8x13 1/2"-----		1.05	
6 Bolts 5/8x16"-----		1.20	
6 Bolts 5/8x17 1/2"-----		1.29	
		<hr/>	
		\$ 4.65	.14
5 Bolts 5/8x35 1/2"-----	50/10/5%	\$ 1.55	
1 Bolt 5/8x45 1/2"-----		.39	
12 Bolts 5/8x64 3/4"-----		6.39	
2 Bolts 5/8x51"-----		.86	
2 Bolts 5/8x38"-----		.66	
48 Bolts 1/2x14"-----		4.85	
		<hr/>	
		\$14.70	6.29

Labor on the rear edger table -----		31.00
2 Truss rods and lugs -----		12.00
1 Hog chain -----		6.50
5 Bolts 3/4x25" ----	50/10/5%	\$ 1.54
5 Bolts 3/4x37" ----		2.14
6 Bolts 3/4x35" ----		2.44
2 Bolts 3/4x47" ----		1.05
15 Bolts 1/2x19" ----		1.91
13 Bolts 1/2x20 1/2" ----		1.79
		<hr/>
		\$10.87
		4.65

4 Bolts 5/8x13" ----	50/10/5%	\$0.56
8 Bolts 1/2x 5 1/2" ----		.48
4 Bolts 5/8x21" ----		.80
3 Bolts 5/8x25" ----		.69
3 Bolts 5/8x23 1/3" ----		.67
4 Bolts 5/8x18" ----		.71
8 Bolts 3/4x31" ----		2.94
16 Bolts 5/8x17" ----		2.72
16 Bolts 1/2x 8" ----		1.12
4 Bolts 1/2x 5" ----		.22
4 Bolts 1/2x 7" ----		.26
4 Bolts 1/2x10" ----		.32
		<hr/>
		\$11.49
		4.91

\$295.97

EXHIBIT D 2.

Labor and Material furnished on 'account of the Machinery Contract of the McDonough Manufacturing Company

Invoices of the Holley-Mason Hardware Company.

1911				Frt	
May 3,	3 sheets 16x30x96 Blk. steel-----	158 lbs.	3.95	6.24	
	4 sheets 16x36x120 Blk. steel-----	300 lbs.	3.95	11.85	
	3 sheets 16x48x120 -----	300 lbs.	3.95	11.85	29.94
<hr/>					
May 13,	12 ft. 2¼" Rd Mild Steel-----	165 lbs.	2.85	4.70	
	1040 ft. ¼x1¼ P & C Track Iron-----	1098 lbs.	3.80	41.72	
	9 sheets 16x30x96 Blk. Iron-----	432 lbs.			
	2 sheets 16x48x120 Blk Iron-----	202 lbs.			
<hr/>					
		634 lbs.	3.95	25.04	
	8 pcs No. 16 24"x120" Blk Iron-----	829 lbs.	3.95	32.75	
	4 pcs 16 24"x48" -----				
	1 pc 16 48"x48" -----				
	1 pc 16 30"x48" -----				
	18 pcs 16 20"x48" -----				
	Cutting -----			3.50	
	20 lbs. ½"x2½" Track Nails-----		.06	1.20	108.91 6.60
<hr/>					
May 20,	134 ft. 8" of 6" Blk pipe-----		69.40	93.46	
	1 6" foot valve-----			4.65	
	1 6" Flg. union-----		1.50 55%	.68	98.79 5.70
<hr/>					
May 27,	150 ft. 1" Black pipe-----	157-2	5.75	9.04	
	70 1½" -----	73-4	9.40	6.89	
	250 2" -----	248-10	12.05	29.98	
	2 2x1 Mal Reducers Blk-----	90	1.80		
	1 2x¾ -----	90	.90		
<hr/>					
			2.70 80%	.54	
	6 1" Mal Ells-----	30	1.80		
	6 1" Tees -----	35	2.10		
	4 1 1/2" Mal Ells Bd-----	60	2.40		
	4 1-1/2 Tees -----	80	3.20		
	8 2" Bd Ells-----	1.00	8.00		
	5 2" Tees -----	1.35	6.75		
	6 2" Mal Crosses-----	2.00	12.00		
<hr/>					
			36.25 80%	7.25	
	3 1" Mal Crosses Unions-----	33	.99		
	6 2" -----	75	4.50		
<hr/>					
			5.49 60%	2.20	
	3 1" Std Globe Valves-----	1.80	5.40		
	2 1 1/2" -----	3.50	7.00		
<hr/>					
			12.40 60%	4.96	
	4 4" C I Flange Unions-----	2.10	8.40		
	1 5" -----	3.15	3.15		
<hr/>					
			11.55 55%	5.20	
	1 5"x6" Black Nipple-----		2.45 70%	.74	
	1 5" C I Cross-----		5.50		
	2 4" -----	3.15	6.30		
	2 4x4x2 C I Red Tees-----	2.00	4.00		
<hr/>					
			15.80 50%	7.90	
<hr/>					
Forward -----				74.69	237.64 12.30

1911

	Forward -----		74.69	237.64	Frts. 12.30
May 27, 2" C I Plugs-----	.10	1.20			
1 1 1/2" -----	.07	.07			
1 5" -----		.88			
		2.15 60%	.86		
1 5" C I Tee serd-----		3.00			
1 5" Ell -----		2.00			
1 5" 45 Ell-----		2.50			
		7.50 50%	3.75		
6 2" Fig 779 Hose Valves-----	27.00	42.00 60%	16.80		
4 2" Scott Gate Valves-----	7.50	30.00 60%	12.00		
2 4" L B Globe Valves Fed-----	19.00	38.00 60%	15.20		
3 5x4 Cast Iron Bushing-----	.93	2.79			
4 4x2 -----	.50	2.00			
		4.79 60%	1.92	125.23	
May 31, 1 6 Close nipples-----		1.85 70%	.56		
1 6 Tee -----		4.00 50%	2.00		
1 6 Cap -----		1.55 50%	.78		
1 pc 6"-6' Pipe Thread-----		76.34	4.58		
1 5 Tee -----		3.00 50%	1.50		
1 pc 5"-2 1/2 Ft do-----		58.85	1.47		
1 5 Cap -----		1.20 50%	.60		
1 5 Gate Valve-----		25.00 60%	10.00		
Cutting pipe -----		3.12 10%	2.81	24.30	
May 31, 1 pc 6" pipe 3 1/2 ft long-----		76.34	2.67		
2 6" Couplings-----	2.40	4.80 60%	1.92		
1 6" Flange Union-----		3.95 55%	1.78		
Cutting Pipe -----		1.75 10%	1.58	7.95	12.65
May 29, 1 No. 204 Upper Sight Feed Arm-----		.75 10%	.68	.68	
Total -----			\$395.80	24.95	
Less 2% -----			7.92		
			387.88		
Freight -----			24.95		
			\$412.83		

30a

1911

Frt.

30b

June 1, 5" Blk pipe 9 ft TBE-OA, 1 pc-----	58.85	5.30
1 Run 5" Blk Pipe 42 ft TBE O.A.-----	58.85	24.72
1 Run 5" Blk Pipe 40 ft TBE O.A.-----	58.85	23.54
1 pc 5" Blk Pipe 4' 6" TBE O.A.-----	58.85	2.65
1 pc 4" Blk Pipe 9' TBE-OA.-----	42.40	3.82
(Including Gate Valve in Center.)		
1 Run 4" Blk Pipe 28 ft TBE, includ-	42.40	11.87
ing Flange Union.-----		
1 pc 4" Blk Pipe 7' 6" TBE, includ-	42.40	3.18
ing Flange Union.-----		
1 Run 4" Blk Pipe 37' TBE, includ-	42.40	15.69
ing Flange Union.-----		
1 Run 4" Blk Pipe 100 ft TBE, in-	42.40	42.40
cluding Flange Union.-----		
Cutting 4 pcs 5" pipe-----	5.48	
Cutting 10 pcs 4" pipe-----	8.75	
1 4" Gate Valve-----	14.23	10 % 12.81
4 4" Flange Unions-----	20.00	60% 8.00
	8.40	55% 3.78
		157.76
June 1, 6-2 to 1 Blk Reducers-----	5.40	
6-2 to 1 1/2-----	5.40	
6 2x3 Short Nipples-----	10.80	80% 2.16
6 2 to 1 Bushings-----	1.62	70% .49
6 1 1/2 to 1 1/4-----	.84	
6 2 to 1 1/2-----	.54	
6 2 to 1 1/2-----	.84	
6 1 1/4 to 1-----	.42	
6 1 to 3/4-----	.36	
	3.00	55% 1.35
6 1"x2 Short Nipples-----	.48	
6 1 1/2x2 1/2-----	.78	
	1.26	70% .38
		4.38
June 5, 1 box No. 166-1 2" Kearsarge Spiral		
Pkg-----	2-10/16 lbs.	
1 box No. 166 1" Kearsarge Spiral	1.35	3.54
Pkg-----	9 10/16 lbs	
1 box No. 181 1 1/2" Hydro Spiral Pkg. 10 3/16	1.35	12.99
2 lbs. No. 222 1/4 Mogul do-----	1.00	10.19
1 lb. No. 222 3/16 do-----	1.00	2.00
1 lb. No. 222 1/8 do-----	1.00	1.00
1 box 166-7/16 Kearsarge Spiral	1.00	1.00
Pkg-----	1-17/16 lbs.	
	1.35	2.36
		33.08
		.30
June 6, 2 yds 1/32 Wire Inserted Mobline		
Packing-----	90 per lb.	
2 yds 1/16-Gum C I Packing	7.65	
(Bought)-----	13 1/2 lbs.	
	19	2.57
		10.22
June 8, 3 lgths 3 8" Blk pipe short length-----	48-2	
2 lgths 1 1/2" pipe short lgth-----	36 3	
12 1 1/2" Blk. Mal. Ells-----	19	2.28
8 3/8" do-----	16	1.28
	3.56	80% .71
6 3/8 Sht Black Nipples-----	.24	
4 1/2 do-----	.20	
	.44	70% .13
4 3/8" Jenkins Globe Valves-----	5.00	50% 2.50
6 3/8" Mal Unions-----	1.20	60% .48
8 3/8 W I Couplings-----	.48	60% .19
Forward-----	0.37	205.44
		.30

1911

Forward -----

Frt

June 8, 2 2'

45 deg. C I Ells-----

6.37

205.44

.30

1 6" I B Swing Check Valve ser'd-----

.68 50%

.34

17.76

24.47

June 8, 2 1/4 pint Zero S F D C Lubricators

3.00

6.00

10.50

.25

3 1/2" do -----

3.50

10.50

17.76

.17

1 1/4" Syphon for steam gauge-----

48.00 63%

17.76

34.68

.85

1 6" I B Swing check valve ser'd-----

42 60%

17.76

34.68

.85

June 8, 4 1 1/2" Crosby angle valves-----

28.00

14.80

2.88

3.60

1 1 1/2" do -----

9.50

13.13

7.85

7.00

11 7/2" 1 1/4" Blk pipe-----

37.50 65%

9.19

15.00

15.00

2 1 1/4" Scott Gate Valves-----

7.00

15.00

15.00

7.50

3 1 1/2" do -----

15.00

15.00

15.00

37.00

2 2" do -----

15.00

15.00

15.00

14.80

6 1 1/4" Blk Mal Bd Ells-----

2.88

1.30

.87

.43

6 1 1/2" do -----

3.60

6.48

.87

2.76

3 1 1/2" Blk C I Bd Tees-----

6.48 80%

1.30

.87

3.48

6 1 1/4" Mal Unions-----

2.76

6.24

.54

.83

6 1 1/2" do -----

3.48

.54

.83

.58

6 1 1/2" Mal Bushing-----

.09

.54

.83

1.25

1 2 1/2" C I Red Tee-----

1.25

2.40

2.40

2.40

1 3x2x2 1/2 C I Red Tee-----

1.25

2.40

2.40

2.40

6 1 1/2" C I Red Tee-----

1.25

2.40

2.40

2.40

1 2 1/2" C I Red Tee-----

1.25

2.40

2.40

2.40

1 3x2x2 1/2 C I Red Tee-----

1.25

2.40

2.40

2.40

1 2 1/2" C I Red Tee-----

1.25

2.40

2.40

2.40

1 3x2x2 1/2 C I Red Tee-----

1.25

2.40

2.40

2.40

1 2 1/2" C I Red Tee-----

1.25

2.40

2.40

2.40

1 3x2x2 1/2 C I Red Tee-----

1.25

2.40

2.40

2.40

1 2 1/2" C I Red Tee-----

1.25

2.40

2.40

2.40

1 3x2x2 1/2 C I Red Tee-----

1.25

2.40

2.40

2.40

1 2 1/2" C I Red Tee-----

1.25

2.40

2.40

2.40

1 3x2x2 1/2 C I Red Tee-----

1.25

2.40

2.40

2.40

1 2 1/2" C I Red Tee-----

1.25

2.40

2.40

2.40

1 3x2x2 1/2 C I Red Tee-----

1.25

2.40

2.40

2.40

1 2 1/2" C I Red Tee-----

1.25

2.40

2.40

2.40

1 3x2x2 1/2 C I Red Tee-----

1.25

2.40

2.40

2.40

1 2 1/2" C I Red Tee-----

1.25

2.40

2.40

2.40

1 3x2x2 1/2 C I Red Tee-----

1.25

2.40

2.40

2.40

1 2 1/2" C I Red Tee-----

1.25

2.40

2.40

2.40

1 3x2x2 1/2 C I Red Tee-----

1.25

2.40

2.40

2.40

1 2 1/2" C I Red Tee-----

1.25

2.40

2.40

2.40

1 3x2x2 1/2 C I Red Tee-----

1.25

2.40

2.40

2.40

1 2 1/2" C I Red Tee-----

1.25

2.40

2.40

2.40

1 3x2x2 1/2 C I Red Tee-----

1.25

2.40

2.40

2.40

1 2 1/2" C I Red Tee-----

1.25

2.40

2.40

2.40

1 3x2x2 1/2 C I Red Tee-----

1.25

2.40

2.40

2.40

1 2 1/2" C I Red Tee-----

1.25

2.40

2.40

2.40

1 3x2x2 1/2 C I Red Tee-----

1.25

2.40

2.40

2.40

1 2 1/2" C I Red Tee-----

1.25

2.40

2.40

2.40

1 3x2x2 1/2 C I Red Tee-----

1.25

2.40

2.40

2.40

1 2 1/2" C I Red Tee-----

1.25

2.40

2.40

2.40

1 3x2x2 1/2 C I Red Tee-----

1.25

2.40

2.40

2.40

1 2 1/2" C I Red Tee-----

1.25

2.40

2.40

2.40

1 3x2x2 1/2 C I Red Tee-----

1.25

2.40

2.40

2.40

1 2 1/2" C I Red Tee-----

1.25

2.40

2.40

2.40

1 3x2x2 1/2 C I Red Tee-----

1.25

2.40

2.40

2.40

1 2 1/2" C I Red Tee-----

1.25

2.40

2.40

2.40

1 3x2x2 1/2 C I Red Tee-----

1.25

2.40

2.40

2.40

1 2 1/2" C I Red Tee-----

1.25

2.40

2.40

2.40

1 3x2x2 1/2 C I Red Tee-----

1.25

2.40

2.40

2.40

1 2 1/2" C I Red Tee-----

1.25

2.40

2.40

2.40

1 3x2x2 1/2 C I Red Tee-----

1.25

2.40

2.40

2.40

1 2 1/2" C I Red Tee-----

1.25

2.40

2.40

2.40

1 3x2x2 1/2 C I Red Tee-----

1.25

2.40

2.40

2.40

1 2 1/2" C I Red Tee-----

1.25

2.40

2.40

2.40

Forward-----

Frt
426.34 6.30

June 12, 1 box Best Moma 172x $\frac{1}{2}$ "-----	2 lbs. 9 oz.	1.15	2.95	
1 coil Aqua Hyd 182x $\frac{1}{4}$ "-----	9 oz.	.95	.53	
1 do do 5/16"-----	1 sq		.95	
1 do do 3/8"-----	1 lb 9 oz.	.95	1.48	
1 do do 1/2"-----	1 lb. 13 oz.	.95	1.72	
2 $\frac{1}{2}$ lbs. Mergal No. 222 $\frac{1}{2}$ "-----	2 $\frac{1}{2}$ lbs.	1.00	2.50	
1 box Duro spiral 171x $\frac{3}{8}$ "-----	1-3 oz.	1.15	1.37	
1 do do 1"-----	8 lbs. 12 oz.	1.15	10.06	
1 do High press diag 1837/16--	8 lbs. 12 oz.	1.15	8.06	
6 Kearsarge Standard gaskets No. 116		1.25	6.87	
size 12K 6x1 $\frac{1}{4}$ x $\frac{1}{2}$ -----	5 $\frac{1}{2}$			
1 sheet 1/16 Pennite No. 60-----	14 $\frac{1}{4}$	1.35	19.24	55.73

303

" 23, 1 4x2 $\frac{1}{2}$ Ell-----

3 1 $\frac{1}{4}$ Gate valves, Scott-----	3.50	1.40 50%	.70	
3 1 $\frac{1}{4}$ do-----	5.00	10.50		

6 1 $\frac{1}{2}$ " Tees Cast-----	29	25.50 60%	10.20	
6 1 1/2" Ells cast-----	20	1.74		

6 1 $\frac{1}{2}$ "-1 $\frac{1}{4}$ Bushing Mal-----	09	2.94 50%	1.47	
6 1 $\frac{1}{4}$ Tees Blk Mal Bd 9 lbs-----	12	.54 55%	.24	
6 1 $\frac{1}{4}$ ells do 73-----	12	1.08 35%		

6 1 $\frac{1}{4}$ x1 Bushing Mal-----	07	1.92 35%	1.25	
3 1 Globe Valve Jenkins-----	2.80	.42 55%	.19	
6 1 Tees Blk Mal 5 lbs-----	12	8.40 50%	4.20	
6 1 Ells " " 5 lbs-----	12	.60		

6 1 3/4 Bushings-----	06	1.20 35%	.78	
3 3/4 Globe Valves Jenkins-----	2.20	.36 55%	.16	
6 3/4 Tees Blk Mal 3 $\frac{1}{2}$ lbs-----	12	6.60 50%	3.30	
6 3/4 Ells " " 2 $\frac{1}{2}$ lbs-----	12	.30		

6 3/4 short nipples 2-----	06	.72 35%	.47	
6 1 " " 2-----	08	.48		
6 1 $\frac{1}{4}$ " " 2 $\frac{1}{2}$ -----	11	.66		
6 1 $\frac{1}{2}$ " " 2 $\frac{1}{2}$ -----	13	.78		

June 14, 2 1 pt Zero D S Lubricator-----

" 14, 3 3" C I Flange Union 150 lbs-----	5.50	11.00	11.00	
2 3" J D-1 B Globe Valve-----	16.75	4.50 55%	2.02	
1 3" J D-1 B "-----	16.00	33.50 50-5%	15.91	
1 3" C I Tee-----	1.10	16.00 60%	6.40	
2 3x3x1 $\frac{1}{4}$ " C U Tees-----	1.25	1.10		

2 3x3 Black Nipples-----	48	3.60 50%	1.80	
1 3x5 "-----		.96 70%		
1 3x6 "-----		.72		
		.85		

1 C I Cross-----	12.25	2.53 70%	.76	
1 7x6 Bushing-----		12.25 50%	6.13	
1 7x5 "-----		1.87		
1 7x3 "-----		1.87		

5.61 60%	2.24	35.26	.70	
----------	------	-------	-----	--

Forward-----

551.97 7.25

Forward-----

Ft

June 15, 2 pcs 3" Blk Pipe 8 ft 6" T.B.E. 17 ft.

(including 3" flange union)

1 pc 3" Blk pipe 14 ft 6" T.B.E.
cutting and threading-----

27.83	4.73	551.97
27.83	4.04	7.25
1.50 10%	1.35	10.12

" 15, 2 pcs 5" pipe with check in cent

22" pipe-----

1 5" Vertical Check valve-----

Cutting and threading-----

30

58.85	2.94
38.00 63%	14.06
1.38 10%	1.24
	18.24

.75

" 17, 2 7" C 1 Ells-----4.70

1 7x3 C 1 Tees-----7.80

9.40	8.60
7.80	

17.20 50%

1 7x5 C 1 Bushing-----
1 7" I B Gate Valve-----

1.87	
45.00	

46.87 60%

40 ft 10" 3" Blk Pipe-----

33 ft 5" 2 1/2" do-----

1 7" sh Blk Nipples-----

25.30	18.75
19.25	10.33
	6.43
3.20 70%	.96
	45.07

" 19, 204' 0" of 1 1/2 Black pipe-----

159' 7" of 2" do-----

52' 2"-16" Black pipe T.B.E.-----

1 6" I B Expansion joint-----

1 6" Gate Valve-----

1 pc 6" T.B.E. Blk pipe 14'-7" long

1 pc 7" do 2' "

1 do 7" do 3' "

1 do 7" do 12" long--

Charge cuts and threads-----9.88.

8 1 1/2" cast iron ell-----20

8 1 1/2" do tees-----29

9.40	19.18
	12.05
	76.34
	45.00 60%
	30.00 60%
	76.34
	11.14
	11.275
	3.38
	1.13
	8.89

3.02 50%

8 1 1/2 Blk short nipples-----13

3 1 1/2" Jenkins Disc globe valves--5.50

4 1 1/2" Cast iron plugs-----07

4 2" do tees-----41

2 2" do plugs-----10

3 2x3 Blk nipples-----27

1 2" Mal Union-----

1 6" cast iron ell-----

2 7" do-----4.70

1.04 70%	1.96
16.50 50%	8.25
28 60%	.11
1.44 50%	.82
.20 60%	.08
81 70%	.24
.75 60%	.30
2.75	
9.40	

12.15 50%

1 7" short blk nipples-----

1 7" Cast iron cap-----

3.20 70%	.96
2.50 50%	1.25
	155.39

" 19, 1 pc 7" Blk pipe 3' 6" T.B.E.-----

1 7" 6' 0"-----

1 7" 16' 6"-----

Charge for cutting and threading

112.75	3.95
112.75	6.76
112.75	18.60
6.15 10%	5.54
	34.85

" 19, 2 3 8" Jenkins Angle Valves-----1.25

2 1 1/2"-----1.60

2.50	
3.20	

5.70 50%

12 2" C 1 Ells-----28

12 1 1/2"-----20

12 1 1/2" tees-----29

12 2"-----41

3.36	2.85
2.40	
3.48	
4.92	

14.10 50%

7.08	9.93	10.15
------	------	-------

Forward-----

825.57 18.15

Forward

June 20, 12 1½ C I Ells-----	16
12 1½ do Tees-----	23
2 3 do do -----	1.10
2 3" do Ells-----	75
1 3x1½x3 C I Tees-----	1.25
1 4" C I Ells-----	1.20

30f

2 3" Close Black Nipples-----	48
1 4" Close Black Nipples-----	85

3 1½" Alal Unions-----	46
7 1½" Jenkins angle valves-----	4.00
1 7x4 C I Bushing-----	

1.81 70%	.54
1.38 60%	.55
28.00 50%	14.00
1.87 60%	.75
	21.26

.35

June 26, 1 7" Close Black Nipples-----	
1 7" C. I. Flange Unions-----	
1 pc 7" Blk pipe 1 ft O" TBE-----	
1 pc 7" Blk pipe 6 ft O" TBE-----	
1 run 7" Blk pipe 31 ft O" E to E TBE	
Cutting and threading-----	

3.20 70%	.96
3.05 55%	1.78
112.75	1.13
112.75	6.76
112.75	34.95
6.38 10%	5.74
	51.32

June 27, 2 7" C I Ells-----	4.70
-----------------------------	------

9.40 50%	4.70
	4.70
	1.00

June 27, 50 ft 1½" Black Pipe-----	48.0
60 1½" -----	59.10
60 3 8" -----	61.2
3 1½" Jenkins Globe Valves-----	1.10
6 1½" Angle -----	1.10

2.35	1.13
3.35	2.01
2.35	1.44
3.30	
6.60	

9 ½" Blk Mal Ells-----	11
9 1½" Tees-----	14

9.90 50%	4.95
.99	
1.25	

3 1x1½" Blk Bushing-----	04
4 1½" Jenkins Angle Valves-----	1.60
4 3/8" -----	1.25
3 ½" Globe -----	1.60
3 3/8" -----	1.25

2.25 80%	.45
.12 55-10%	.05
6.40	
5.00	
4.80	
3.75	

6 3/8" Shl Black Nipples-----	04
6 3/8 Close -----	04

19.95 50%	9.98
.24	
.24	

6 1 2" Shl Blk Nipples-----	05
6 1 2" Close -----	05

.48 70%	.14
.30	
.30	

6 3 8" Blk Mal Ells-----	16
3 3 8" Tees-----	22

.60 70%	.18
.96	
.66	

6 1½" Mal Unions-----	18
-----------------------	----

1.62 80%	.32
1.08 60%	.43
	21.08
	2.50

June 27, 1 2½ Whistle Valve-----	
----------------------------------	--

8.50	8.50
------	------

June 29, 1 7" Short Black Nipples-----	
1 7" C I Flange Union-----	
1 2 doz 1" + ply Hose Clamps-----	

3.20 70%	.96
5.50 55%	2.48
.85 (doz)	.42
	3.86

Forward -----

926.29 22.00

June 28, 08' 0" 3 4" Blk Pipe-----

108' 10" 1" Blk Pipe-----

3 pc 4" Blk Pipe 2' 0" TBF-----

Cutting and threading-----

1 2" C I 45d Ells-----

2 1 1/2" do -----

1 2 1/2" do -----

2 3" do -----

30g

25 ft 1" +ply water hose, Bay State--

1 7x7x0 C I Tees-----

6 7x5 C I Bushing-----

3 3" C I Ells-----

3 3x2 C I Tees-----

3 3" C I Tees-----

3 1 1/2x1 1/4 Mal Bushings-----

6 1 1/4" Mal Unions-----

6 1 1/2" do -----

6 2" do -----

6 3/4" C I Plugs-----

6 1" C I Plugs-----

2 1 1/4" do -----

6 1 1/4" Blk Mal Bd Ells-----

6 1 1/4" " " " Tees-----

6 1" " " " "-----

6 1" " " " Ells-----

6 3 4" " " " "-----

3 3 4" Jenkins Globe Valves-----

3 1" do -----

3 1 1/4" do -----

6 3 4" Short Blk Nipples-----

6 1" do -----

6 1 1/4" do -----

6 3/4" Blk Mal Tees-----

3 1x3/4" Mal Bushings-----

3 1 1/4x1 do -----

6 3/4" Mal Unions-----

6 1" do -----

4 2 1/2" C I Flange Unions-----

6 2x1 1/2" Blk Bushings-----

3 2 1/2x2 C I "-----

2 3x2 " "-----

3 4x3 " "-----

3 3x2 1/2 " "-----

6 1 1/2" Short Blk Nipples-----

6 1 1/2" Close Blk Nipples-----

6 1 1/2x1 1/2 do -----

3 2 1/2" Short do -----

3 2 1/2" Close Blk Nipples-----

2 4" Close " "-----

2 4x1 1/2 " "-----

12 1 1/2" C I Ells-----

12 1 1/2" C I Tees-----

3 1 1/2" C I 45d Ells-----

400 ft

5.75

42.40

2.64 10%

.34

.48

.60

1.80

3.22 50%

2 1/2

7.80 50%

11.22 60%

2.25

3.75

3.30

9.30 50%

27 55%

2.76

3.48

4.50

.18

.24

.10

11.20 60%

2.88

3.60

2.10

1.80

1.08

11.46 80%

6.60

8.40

12.00

27.00 50%

.36

.48

.66

1.50 70%

1.38 80%

.18

.21

.30 55%

1.62

1.98

3.60 60%

5.00 55%

.84 55%

.63

.60

1.50

.90

3.03 60%

78

78

1.20

1.17

3.93 70%

1.17

1.70

2.40

5.27 70%

2.40

3.48

Frt.

930.29 22.00

Forward -----

6 2" C I Ells-----	34
6 2" C I Tces-----	41
2 2 1/2" C I Ells-----	50
2 2 1/2" C I Tces-----	73

6.60 65.40 936.29 22.00

2 2 1/2" C I Plugs-----	07
2 2" do -----	10

13.50 50% 6.78

30lb

6 1 1/2" Scout Gate Valves-----	5.00
2 2" do -----	7.50

.34 60% .14

30.00

15.00

6 1 1/2" Figs 744 Air Cock-----	45
1 6x5 C I Bushing-----	
1 7x3 do -----	

45.00 60% 18.00
2.70 70% .81
1.25
1.87

3.12 60% 1.25 92.44 2.30

Loss 2% -----

1028.73 24.30
20.57

Freight -----

1008.16
24.30

\$1032.46

July 6, 6 3 4 Blk Ells-----	18
6 3 4 Blk Tces-----	23

1.08
1.38

4 3 4 " Union-----

2.40 80% .20

3 3 4 " Plug-----	03
-------------------	----

1.08
09

4 3 4 Globe Valves (Jenkins)-----	2.20
-----------------------------------	------

1.17 60% .47

4 1 Blk Mat Hd Ells-----	.30
4 1 " " Tces-----	.35

8.80 50% 4.40
1.20

1.40

4 1 " " Union-----	.33
4 C I Plugs-----	04

2.00 80% .52
1.32 60%
10

4 1 Jenkins Globe Valves-----	2.80
1 4 Gate Val-----	

1.48 60% .50
11.20 50% 5.60

35 12.42 30

Loss 2% -----

12.42
25

Freight -----

12.17
30

\$12.47

EXHIBIT D 3.

Labor and Material Furnished on Account of Machinery
Contract of the McDonough Manufacturing
Company.

Invoice of Washington Machinery and Supply Company.

May 2, 1911. 6 ft 2 3/16" T. & G.
shaft ----- \$ 3.85
2 2 3/16" flat boxes--- 3.90
2 2 3/16" saftey set col-
lars ----- 1.20
2 20x6x2 3/16" steel
split pulleys ----- 10.80
8 ft. 2 15/16" T. & G.
shaft ----- 8.90
2 2 15/16" solid boxes-- 5.00
2 2 15/16" safety set col-
lars ----- 2.00 \$35.65

May 3, 1911. Freight on shipment of
May 1, 1911.
Prepaid to Cusick, Wash. \$ 1.00 \$ 1.00
2 Steel pulleys -----
1 Sk. Castings -----
2 Pcs. Shaft -----
May 16, 1911. 3 7/8" Safety collars--- \$ 5.28
7' 2 3/16" Shaft K. S.--- 6.23
1 Steel split pulley 16x8
x2 15/16" ----- 4.95 \$16.46

May 17, Freight on shipment of
5/16/11.

	Prepaid to Cusick, Wash.		
	1 Pulley -----		
	1 Set fittings, 100 lbs.---	\$.30	\$.30
	1 Pc. Shafting -----		
July 8,	1 Casting as per sample---	\$3.77	
	Freight -----	.75	4.52
			<hr/>
			\$57.93

EXHIBIT D 4.

Labor and Material furnished on account of the Machinery Contract of the McDonough Manufacturing Company.

Invoices of Newport Iron Works.

1911.

May 12.	Keyseating shaft ----	\$ 1.50		
	Freight and drayage--	1.20	2.70	\$2.70
			<hr/>	
June 15.	20½' of 5" pipe-----	\$ 5.35		
	Prepaid freight -----	.50	5.85	
			<hr/>	
June 17.	3 2½" close nipples---	\$.75		
	3 1 1/4" Mal Beaded			
	tees -----	.75		
	9 1¼" Cast elbows--	1.15		
	Prepaid express ---	.35	3.00	
			<hr/>	
	1 Pc. 5" pipe 11' 8"			
	thd 2 ends-----			
	1 Pc. 5" pipe 9' 8"			
	thd 2 ends-----			

2 Pcs. 5" pipe 1' 10"		
thd 1 end-----	18.40	
4 5" cast elbows-----	5.20	
2 5" close nipples-----	1.00	24.60

June 27.	6 3/4" plugs -----	\$.30	
	3 1x3/4 Bushings ---	.15	
	6 3/4" Unions -----	1.20	
	6 1" Unions -----	1.50	
	6 1" Nipples -----	.35	
	3 3/4" Globe Valves--	3.00	
	6 3/4" Nipples -----	.30	
	6 3/4" Elbows -----	.85	
	6 3/4" Tees -----	.90	
	6 1" Tees -----	1.20	
	6 1" Elbows -----	.90	
	6 1" Plugs -----	.30	
	3 1¼x1" Bush -----	.15	
	Prepaid freight and		
	express -----	12.30	12.30

June 29.	1 4x2½ Bushing ---	\$.35	
	1 5" Globe Valve-----	6.00	
	2 Pcs. 5" pipe fitted to		
	valve -----	2.40	
	1 4x1½x5 Tee -----	1.50	
	4 3" Nipples -----	1.20	
	2 3" Elbows -----	1.80	
	6 1" Couplings -----	.60	
	3 1½" Couplings ---	.35	

3 1" Globe Valves---	3.75	
1 3x2 Bushing -----	.25	
2 3" Flange Unions--	2.00	
2 3" Nipples -----	.60	
3 3x3x1½ Tees -----	3.00	
91' 1¼" pipe-----	8.20	
1 3" Valve -----	4.90	
1 3" Nipple -----	.30	
14" 3" pipe thd 2 ends	.75	
Prepaid freight ---	.40	38.35

\$84.10

Invoices of Newport Iron Works—Continued.

July 3.	5 3" Nipples -----	\$ 1.50
	1 3" Gate Valve-----	7.80
	1 3" Elbow -----	.90
	1 3" Flange Union	
	(second hand) ----	.85
	12 2" Nipples, 12 1½	
	and 12 1¼ Nipples--	3.10
	6 1½" Unions -----	1.75
	6 1¼" Unions -----	1.50
	6 1/4 Elbows -----	1.15
	6 1 1/4 Tees -----	1.80
	3 1¼ plugs drilled	
	and tapped for ¼"	
	pipe -----	.35
	3 3/4" Unions -----	.45
	2 2" Globe Valves	
	(Jenkins) -----	10.00
	62' of 1¼ Blk pipe---	5.60

Prepaid freight and
express ----- .75 \$37.50

July 7, 4 4" Nipples ----- \$ 1.60
 3 1½x1¼ Bushing -- .30
 Prepaid express --- .30
 Work on 6" pipe--- 2.25
 Paid freight-dray-
 age on pipe----- 1.20 \$ 5.65

July 8. 6 ¼" assorted Nip-
 ples ----- \$.20
 6 ½" Elbows ----- .25
 6 1/4" Tees ----- .30
 3 ¼" Unions ----- .40
 3 1/4" Couplings --- .25
 3 1/4" Globe Valves-- 1.50
 Prepaid express --- .25
 3 3x3x1½" Tees --- 3.00
 1 4x5 Cast Ell in place
 of bent one----- No charge.
 2 4" Cast Ells----- 2.00 \$ 8.15

July 10. Prepaid express on
 pipe fittings from
 Spokane ----- \$ 1.25 \$ 1.25

July 24. 1 6" Cap ----- \$ 1.00
 1 4" Plug ----- .35
 1 3" Plug ----- .25
 6 2" Nipples ----- .90

Prepaid express --- .35 \$ 2.85

July 10. 6 1/2" Couplings ----\$.50
 6 1/2" Unions ----- 1.00
 6 1/2" Elbows ----- .60
 6 1/2" Tees ----- .70
 4 1/2" Plugs ----- .25
 3 1/2x3/8" Bushings -- .15
 1 Signal Whistle ---- 1.00
 4 1/2" Standard Valves 3.40
 2 1/2" Jenkins Valves_ 2.50
 Prepaid express --- .30 \$10.40

July 12. 46' of 1 1/2" black pipe-\$ 5.30
 8 3/8 to 1/4 Bushings .40
 6 1/4" Nipples, close_ .30
 6 3/8" close nipples__ .35
 Prepaid express --- .25 \$ 6.60

\$72.40

EXHIBIT D 5.

Labor and Material Furnished on Account of Machinery
 Contract of the McDonough Manufacturing
 Company.

Invoice of Crane Company.

	July 10, 1911	Price	Gross	Net
5	6" Std C I Ells Scd--50%	2.75	13.75	6.87
4	6" Sht Blk Nipples--70%	1.85	7.40	2.22
2	6 Flange Unions---50%	3.95	7.90	3.95
2	6 Blk W I Couplings_55%	2.40	4.80	2.16
2	1/4 No. 700 Pet cox--70%	.45	.90	.27

1 pc 6" Blk pipe 4' 0" TBE.	}	76.34	3.94
1 " 6" 0' 14" "			
5' 2" -			
2 6 Cuts -----		.35	.70
4 6 Threads -----		.70	2.80
		<hr/>	
10%		3.50	3.15
		<hr/>	
			22.56
Freight ----			1.05
		<hr/>	
		\$23.61	

EXHIBIT D. 6.

Labor and Material Furnished on Account of the Machinery Contract of the McDonough Manufacturing Company.

Invoices of Marshall-Hillis Hardware Company

1911

Apr 14. 560 ft $\frac{3}{4}$ x3 Mild Steel -----4421 2-85/100 126.00

130 $\frac{5}{8}$ x6 S. T. Sleigh shoe bolts 130 7-58/100 9.85

100 $\frac{5}{8}$ x7 " " " 1 8.26 8.26

50

14 hrs time for drilling mild steel 45% 18.11

14 60

9.96 8.40 144.36

2%

144.36
2.88

Apr 27. 1 Box Iron bolts, 36 bars iron-----

May 2. 200 ft $1\frac{1}{4}$ x1 $\frac{1}{2}$ Mild Steel -----246 3 05/100

330 ft $\frac{3}{4}$ x2 " " -----553 3-05/100

44 ft $\frac{3}{8}$ x1 $\frac{1}{4}$ " " -----76 2-85/100

5 Gro 1x10 F. HB Bri Screws for

above 87 $\frac{1}{2}$ % -----5 1.20

Work for drilling mild steel net-----

2%

35.74
.71

Pod. Freight -----

35.03
3.10

Aug 19. 2 only 6" Cast iron Ells 2 2.75

50%

5.50

2.75

\$38.13

1 6" short nipples 1 1.85

60%

1.85

.74

1 pc spring steel 1/8x2-----

6 ft

5

6

.30

3.79

.25

2%

3.79
.07

Freight -----

3.72
.25
\$3.76

EXHIBIT D 7.

Labor and Material Furnished on Account of the Machinery Contract of the McDonough Manufacturing Company

Invoice of Union Iron Works

1911

June 22, 2 Pulleys 30x10 S. F., bore 2 15, K.S.	16.20	32.40
July 29, Strtn. up bent spokes in 8" top wheel for sand mill	5.75	
1 Saw wheel turning device	xx	
Charge two ways	3.00	8.75

Aug. 3, July 31, 10½ hours }
 Aug. 1, 30 hours } Turning band wheel at Cusick
 2 13½

54 hours—6 days @ 6.00	36.00	
Cash expenses	5.90	41.90
Freight 8/3		46.00
		\$87.90

Aug. 14, 1 Centre for Circle saws	{	
1 Flange		
1 Steel collar 5½ dia.		9.50
3/16 thick, 1¼ hole		
Freight		.25
		\$9.75

EXHIBIT D 8.

Labor and Material Furnished on Account of Machinery
Contract of the McDonough Manu-
facturing Company

Invoice of Dalkena Lumber Company

April 30, 1911, Prepaid freight on foundation bolts \$1.50

EXHIBIT D 9.

Labor and Material Furnished on Account of Machinery
Contract of the McDonough Manu-
facturing Company

Invoice of Spokane Saw Works

1911

July 14, 1 only No. 1 Hanchett Circular

Saw Swage A -----	35.00	
10% -----	3.50	31.50

Expressage -----		.60
------------------	--	-----

\$32.10

Endorsements: Received a copy of the within
amended answer and cross-complaint at Spokane,
Wash., this 23d day of February, 1912.

(Signed) McCARTHY & EDGE,
Attorneys for Plaintiff.

Amended Answer and Cross-Complaint.

Filed February 28th, 1912.

WM. H. HARE, *Clerk.*

By F. C. NASH, *Deputy.*

DOCKETED 4/2/12

AT LAW.

No. 1586.

In the District Court of the United States for the Eastern District of Washington, Northern Division.

McDONOUGH MANUFACTURING COMPANY,
a Corporation,

Plaintiff,

vs.

M. A. PHELPS LUMBER COMPANY, a Corporation,
ation,

Defendant.

REPLY.

Comes now the above named plaintiff, the McDonough Manufacturing Company, and for reply to the separate and affirmative answer and counterclaim of defendant M. A. Phelps Lumber Company, admits, denies and alleges, as follows:

1. Admits paragraph 1, except that plaintiff denies that plaintiff, during said time or at any other time, or at all, negotiated with defendant for the furnishing of metal of every kind and nature necessary for the completion of said alleged mill or any metal or iron or machinery whatsoever other than the amount of machinery necessary to be installed in a mill of the kind alleged in said paragraph, and the bolts necessary to install said machinery in said mill when completed.

2. Denies paragraph 2 and each and every allegation therein contained.

3. Denies paragraph 3 and each and every allegation therein contained.

4. Replying to paragraph 4, plaintiff admits that there has been delivered to and is now in its possession, an instrument in writing signed by plaintiff and defendant, of which Exhibit "B" is a copy, and admits that plaintiff has in its possession a copy of said general specifications therein described, and plaintiff denies each and every remaining allegation, matter and thing in said paragraph contained.

5. Denies paragraph 5 and each and every allegation therein contained.

6. Denies paragraph 6 and each and every allegation therein contained.

7. That the plaintiff has not knowledge or information sufficient to form a belief as to whether or not said defendant was, on or about the time mentioned in paragraph 7, or at any other time, engaged in the general lumber and timber business or either or any of them, and therefore plaintiff denies the same and each and all thereof;

That plaintiff has not knowledge or information sufficient to form a belief as to whether or not said defendant was planning with said alleged mill to be installed as alleged in paragraph 7 or otherwise, and with said alleged machinery or otherwise to be furnished, to start in the manufacture of lumber or other material on or before May 1st, 1911, or at any other time, and plaintiff therefore denies same and each and all thereof;

And plaintiff denies each and every remaining allegation in said paragraph contained, save and except that plaintiff admits that it sold to defendant certain sawmill machinery which, if properly installed in a saw-

mill and properly operated in said mill, would render said mill a capacity of Fifty-five Thousand (55,000) feet of lumber day shift and Fifty Thousand (50,000) feet of lumber night shift, but denies that said machinery or any part thereof was sold or delivered or either of them to defendant in accordance with said alleged contract described in said answer.

8. Denies paragraph 8 and each and every allegation therein contained.

9. Denies paragraph 9 and each and every allegation therein contained.

10. Denies paragraph 10 and each and every allegation therein contained, except that plaintiff admits that it furnished to defendant the machinery described in specifications referred to in paragraph 4 of said affirmative answer, and also that it furnished to defendant the machinery described in Exhibit "B" hereto annexed and by reference made part hereof.

11 Denies paragraph 11 and each and every allegation therein contained, except that plaintiff admits that plaintiff furnished to defendant all that machinery described in the specifications mentioned in paragraph 4 of defendant's affirmative answer, and also all that machinery described in said Exhibit "B" hereto annexed and by reference made part hereof.

12. Denies paragraph 12 and each and every allegation therein contained, except that plaintiff admits that it furnished and delivered to defendant no machinery whatever other than that referred to in general specifications mentioned in paragraph 4 of said affirma-

tive answer, and that mentioned in Exhibit "B" hereto annexed and by reference made part hereof.

13. Denies paragraph 13 and each and every allegation therein contained.

14. Denies paragraph 14 and each and every allegation therein contained, except that plaintiff admits that plaintiff furnished defendant no machinery or materials whatsoever other than that described in specifications mentioned in paragraph 4 of said affirmative answer, and other than that mentioned in Exhibit "B" hereto annexed and by reference made part hereof.

15. Denies paragraph 15 and each and every allegation therein contained.

16. Denies paragraph 16 and each and every allegation therein contained.

17. Denies paragraph 17 and each and every allegation therein contained, except that plaintiff admits that said notes were given in part as consideration for machinery sold and delivered by plaintiff to defendant, but denies that said machinery or any part thereof was sold or delivered, or said notes or either or any of them were executed or delivered on account of the contract described in defendant's affirmative answer, and denies that said machinery or any part thereof was other or different from that mentioned in specifications described in paragraph 4 of said affirmative answer, and that mentioned in Exhibit "B" hereto attached and by reference made part hereof, and denies that the value of said machinery so sold and delivered by plaintiff to defendant, and the amount to which plaintiff became entitled to payment therefor, or in either or any of said

manners or ways, was or is any sum whatsoever other or less than the sum of Twenty-two Thousand Four Hundred Ninty-eight and 97/100 Dollars (\$22,498.97).

For a second and affirmative defense to the defendant's amended answer and counterclaim, plaintiff alleges that there is now another action pending between the same parties for the same cause of action as that described in defendant's affirmative answer and cross-complaint, which said action was commenced by said defendant prior to the commencement of the said action herein, and which said action is being asserted by said defendant as a cross-complaint in action entitled McDonough Manufacturing Company, a corporation, complainant, vs. M. A. Phelps Lumber Company, a corporation, defendant, and in which said action said M. A. Phelps Lumber Company is cross-complainant, and which said action was commenced and is pending in the District Court of the United States for the Eastern District of Washington, Northern Division, and that paragraphs numbered 2-17 respectively, of said cross-complaint in said action, are identical with paragraphs numbered 1-16 respectively of the amended answer and cross-complaint herein, and that a copy of the remaining portions of said amended cross-bill is hereto annexed, marked "Exhibit A" and by reference made part hereof.

WHEREFORE plaintiff prays that defendant take nothing by its said affirmaitve answer and counter-

claim, and that plaintiff have judgment in accordance with the prayer of plaintiff's complaint herein.

(Signed) McCARTHY & EDGE,

Attorneys for Plaintiff.

STATE OF WASHINGTON,

County of Spokane—ss.

Joseph McCarthy, being duly sworn on oath deposes and says: That he is one of the attorneys for the above named plaintiff in the above cause, and makes this verification for and on its behalf, for the reason that no officer or agent of the plaintiff is within the State of Washington, but that such officers and agents are without the State of Washington; that he has read the foregoing reply, knows the contents thereof, and the same is true to the best of his knowledge, information and belief, and that he believes the matters therein contained to be true.

(Signed) JOSEPH McCARTHY.

Subscribed and sworn to before me this 28th day of March, 1912.

(SEAL) (Signed) HANCE H. CLELAND,

Notary Public in and for the State of Washington, Residing at Spokane.

"EXHIBIT A."

No. ----

IN EQUITY.

In the Circuit Court of the United States for the Eastern District of Washington, Eastern Division.

McDONOUGH MANUFACTURING COMPANY,
a Corporation, *Complainant,*

vs.

M. A. PHELPS LUMBER COMPANY, a Corporation,
Defendant.

AMENDED ANSWER AND CROSS COMPLAINT.

The defendant, M. A. Phelps Lumber Company, a corporation duly organized and existing under the laws of the State of Washington, with its principal place of business in Spokane, said State, and a citizen and inhabitant of said State, further answering the said amended bill of complaint of the complainant, and for affirmative answer and by way of cross-complaint, complains of the said complainant, McDonough Manufacturing Company, and says:

1. That this defendant is now, and was at all of the dates herein mentioned, a corporation organized and existing under the laws of the State of Washington, with its principal place of business in Spokane, in said State, and the said complainant, McDonough Manufacturing Company, was a foreign corporation.

(Paragraphs numbered 2-17, both inclusive.)

Having thus made full answer to all matters and things contained in the amended bill, this defendant prays to be dismissed hence with its costs in this behalf incurred.

This defendant further prays that upon final hearing of this cause, it be ordered and decreed that there is due and owing to this defendant over and above any balance remaining due complainant under its said contract, the sum of \$15000.00, and that this defendant have judgment against the complainant for the said sum, and for costs of suit.

To the end that defendant may obtain the relief prayed for in its said cross-complaint, defendant further prays the Court to grant it process by subpoena directed to the said complainant, McDonough Manufacturing Company, a corporation, commanding it to appear and answer, not under oath, the same being waived, all the allegations of the cross-complaint herein.

(Signed) DANSON, WILLIAMS & DANSON,
Attorneys for Defendant.

UNITED STATES OF AMERICA,
State of Washington,
County of Spokane—ss.

Personally appeared before me, the undersigned, M. A. Phelps, who being first duly sworn, on oath says: That he is the President of the M. A. PHELPS LUMBER COMPANY, a corporation, defendant above named, and makes this verification for and on its behalf; that he has read the foregoing answer and cross-complaint, knows the contents thereof and the same is true to the best of his knowledge, information and belief, and he believes the matters therein contained to be true.

(Signed) M. A. PHELPS.

Subscribed and sworn to before me this 17th day of February, 1912.

(SEAL) (Signed) JAS. A. WILLIAMS,
Notary Public in and for the State of Washington, Re-
siding at Spokane.

EXHIBIT "B."

1 extra boiler -----	\$2918.75
1 extra steam drum -----	130.00
extra for increasing length of breeching from 27" to 35" -----	43.00

Furnishing pump for 3 boilers instead of
for 2 boilers as originally contracted for

Our letter 12/9/10, yours 12/17/10

Shipped C. & N. W. Car No. 52727, 4/20/11-- A20657.	46.13
--	-------

Refuse conveyor for lath room, your letter
3/30/11, ours 4/10/11.

1 shaft 2 3/16x6' K. S.-----	\$ 7.50
1 pulley 40x7x2 3/16 K. S.-----	25.45
1 B. pinion No. 73, 2 3/16" B. K. S.	8.64
1 set collar 2 3/16 -----	1.80
2 - No. 12 F. boxes -----	7.60
1 shaft 2 7/16x38" K. S.-----	4.75
1 bevel gear No. 72, 2 7/16" B. K. S.	55.20
1 - 9 T. No. 104 Spkt. 2 7/16" B. K. S.	14.80
1 set collar 2 7/16 -----	2.00
2 - No. 16 F. boxes -----	9.20
1 shaft 1 15/16x2' 6" -----	2.63
1 tail idler K-11, 1 15/16" K. S.----	14.80
2 set collars 1 15/16 -----	2.80
2 - No. 10 F. Boxes -----	7.20

80' of No. 104 Chain----- 41.60
 1 pulley 16x7x2 15/16 K. S.----- 7.45

\$171.82—60% 68.73

Freight on above E. C. to Cusick 1912 lbs.
 at \$1.50 ----- 28.68

Shipped C. & N W Car No. 52727, 4/20/11
 No. 20387

Additional log chain dogs & return idler

Your letter 12/31/10 our 3/1/11

75' of 1 1/4x8" R. L. Chain----- 71.25

9 cast steel dogs at \$7.20----- 64.80

1 shaft 2 7/16x3' ----- 4.50

2- No. 40 solid boxes ----- 5.60

\$10.10—60% 4.04

1 5 T. No. 22 Flanged Idler----- \$18.90

\$3435.88

Amount carried forward ----- \$3435.88

Fr. on above E. C. to Cusick 2240

lbs at \$1.50 ----- 33.60

Shipped 3/18/11 N. P. car No. 85658

& N. P. Car No. 85744, 1/23/11.

No. 20480.

Filing room engine your letter 3/16/11

1- 8 H. P. V. engine----- 91.60

Fr. on same Kalamazoo to Eau C.

750 lbs—66cts. ----- 4.95

Eau C. to Cusick, 750 lbs at \$1.50-- 11.25

Shipped N. P. Car. No. 85658, 3/18/11

1 nigger bar complete sides 1"x7 fill-
ers for 2 3/4" tooth----- 129.80

Frts. on above E. C. to Cusick 860 lbs.
at \$1.00

Shipped N. P. Car No. 85658 3/8/11 12.90

No. 20558.

1 B. box No. 24, 3/7/8" (McIntures
letter 2/28/11) ----- 5.90

Frts. on above E. C. to Cusick

Shipped N. P. Car No. 85658 3/18/11 2.25

No. 20659.

Boiler conveyor pan J. R. Bonds letter
2/13/11 ours 2/21/11 yours 2/16/11

1 extra length conveyor pan shipped
N. P. Car No. 85658, 3/18/11---- 40.50

No. 20680.

Your letter 2/16/11

8 steel cleats No. 181 at \$3.60----- 28.80

Frts. on 136 lbs. at \$1.50----- 2.84

Shipped C. & N. W. Car No. 52727

No. 20355.

Sec. 136 Idler & Tightener (your let-
ter 3/16/11 on account burner
conveyor being on angle.

2 shafts 2 7/16x3' ----- \$ 9.00

2 D. B. pulleys 24x

10 1/2x2 7/16 K. O. 44.12

4 upright boxes No. 16-- 19.20

4 upright set collars

2 7/16 ----- 8.00

\$80.32—60% 32.13

Frts. on above E. C. to Cusick 728	
lbs. at \$1.50 -----	11.70
Shipped N. P. Car No. 55456, 2/28/11	
1 band saw 44' 6", 12" wide, 14 Ga.	89.00
Shipped C. & N. W. Car No. 62727	
Frts. on same E. C. to Cusick 273 at	
\$1.50 -----	4.10

No. 20679.

6 S. set collars 2 7/16_	\$12.00
1 S. set collar 2 3/16_	1.80
1 S. set collar 2 11/16	2.20
1 S. set collar 2 15/16	2.40
1 S. set collar 2 7/8"_	2.40

\$20.80—60% 8.32

Frts. on above E. C. to Cusick, 100 lbs.	
at \$1.50 -----	1.50

Your wire 3rd inst.

30' of No. 104 & 104-C chain-----	17.40
30' of No. 110 chain -----	24.00
81 links No. 75 chain-----	2.20

\$3990.32

Amount carried forward ----- \$3990.32

4 H-1 attachments ----- 50.00

Frts. on above E. C. to Cusick 660 lbs.	
at \$1.50 -----	9.90

Shipped C & N W Car No. 52727,
4/20/11

Your wire 4/18/11

81 links No. 75 link belt chain ----- 2.20

4 attachments A-1 -----	.50
Frts. on above E. C. to Cusick 50 lbs. at \$1.50 -----	.75
Shipped C. & N. W. Car No. 52727	
60' of 7/8x6" R. L. Chain-----	28.80
<hr/>	
Total -----	\$4032.97

Endorsements: Reply.

Service of the within reply admitted this 29th day of March, 1912, by receipt of copy.

DANSON, WILLIAMS & DANSON.

Filed Mar. 29, 1912.

WM. H. HARE, *Clerk*.

By S. M. RUSSELL, *Deputy*.

No. 1586.

In the District Court of the United States for the Eastern District of Washington, Northern Division.

McDONOUGH MANUFACTURING COMPANY,
a Corporation, *vs.*

M. A. PHELPS LUMBER COMPANY, a Corporation.
ation.

VERDICT.

We, the jury in the above entitled cause, find for the plaintiff, and fix the amount of its recovery at the sum of Twenty-eight Hundred Eighty-three and 69/100 Dollars.

(Signed) I. J. BALLINGER, Foreman.

Endorsements: Verdict.

Filed April 22, 1912.

W. H. HARE, *Clerk*.

By FRANK C. NASH, *Deputy*.

No. 1586.

AT LAW.

In the District Court of the United States for the Eastern District of Washington, Northern Division.

McDONOUGH MANUFACTURING COMPANY,
a Corporation,

Plaintiff,

vs.

M. A. PHELPS LUMBER COMPANY, a Corporation,
ation,

Defendant.

JUDGMENT ON VERDICT.

Came again the above named plaintiff, the McDonough Manufacturing Company, a corporation organized under the laws of the State of Wisconsin, with principal place of business at Eau Claire, Wisconsin, and a resident and citizen and inhabitant of said place, and its attorneys, McCarthy & Edge, and the M. A. Phelps Lumber Company, a corporation organized under the laws of Washington, with principal place of business at Spokane, Washington, and a resident, citizen and inhabitant of said place, and its attorneys, Danson, Williams & Danson, and came again also the jury heretofore empaneled and sworn herein, when the trial of this cause was again resumed, and the jury having heard the testimony, listened to the arguments of counsel, and received the charge of the Court, upon their oaths do say, that they find the issues herein joined to be in favor of said plaintiff and against said defendant, and they assess the amount of plaintiff's damage and recovery herein

against defendant at the sum of Twenty-eight Hundred Eighty-three 69-100 (\$2883.69) Dollars.

On motion of plaintiff, the McDonough Manufacturing Company, it is therefore hereby considered by the Court and said plaintiff do have and recover of and from said defendant the M. A. Phelps Lumber Company said sum of Twenty-eight Hundred Eighty-three 69-100 (\$2883.69) Dollars and costs of this suit taxed at \$222.08 Dollars, and the collection of which said sum and costs execution is hereby awarded.

Done in open court this 25th day of April, 1912.

(Signed) FRANK H. RUDKIN,
Judge.

Endorsements: Judgment on Verdict.

Filed Apr. 24, 1912.

W. H. HARE, *Clerk.*

By F. C. NASH, *Deputy.*

1215

SERVED 5/16/12

No. 1586.

In the District Court of the United States for the Eastern District of Washington, Northern Division.

McDONOUGH MANUFACTURING COMPANY,
a Corporation, *Complainant,*

vs.

M. A. PHELPS LUMBER COMPANY, a Corporation,
Defendant.

PETITION.

Comes now the defendant M. A. Phelps Lumber Company and respectfully petition the Court that it be

granted a new trial in this action for the following causes materially affecting the substantial rights of defendant:

1. Irregularity in the proceedings of the Court by which defendant was prevented from having a fair trial.
2. Insufficiency of the evidence to justify the verdict.
3. Error in law occurring at the trial.

This petition is made upon the records and proceedings in this cause, upon the evidence introduced on the trial, upon the rulings of the Court and exceptions thereto, and instructions of the Court and exceptions thereto, the particular errors in law being the following to which defendant at the time excepted, to-wit:

1. On the trial the Court, over the objection of defendant, permitted complainant to introduce evidence for the purpose of showing excuses on the part of complainant for failure to deliver the machinery within the time contracted. Among other questions which defendant was permitted to ask his witness and to have answered is the following, propounded by complainant to witness Hubbard:

“Q. All right, Mr. Hubbard, you may state what caused the delay in the shipment of the machinery mentioned in the contract of Nov. 12.”

2. The Court, in the instructions to the jury, gave the following instruction to which defendant at the time excepted, to-wit:

“After you determined the outside dates at which this machinery could have been delivered within the terms of the contract, and within the contemplation of the parties, you will next determine whether or not the de-

fendant is entitled to offset damages for delay beyond the date of performance. In determining this question, you have a right to take into consideration all the facts and circumstances in the case. You have a right to consider all of the causes of the delay, and whether they have been acceded to by the defendant and everything in evidence that will throw light upon that question. If you find that there was a delay, caused by the failure of the plaintiff to perform its contract, without fault upon the part of the defendant, and that such delay has not been acceded in by the defendant, it will be entitled to recover damages occasioned by such delay."

DANSON, WILLIAMS & DANSON,

Attorneys for Defendant.

Endorsements: Petition for new trial.

Received a copy of the within petition at Spokane, Wash., this 16th day of May, 1912.

McCARTHY & EDGE,

Attorneys for Plaintiff.

Filed May 16, 1912.

WM. H. HARE, *Clerk.*

By FRANK C. NASH, *Deputy.*

No. 1586.

In the District Court of the United States for the Eastern Division of Washington, Northern Division.

McDONOUGH MANUFACTURING COMPANY, a
Corporation,

vs.

M. A. PHELPS LUMBER COMPANY, a Corporation.

ORDER OVERRULING MOTION FOR NEW
TRIAL.

Now on this day this matter coming on for hearing on defendant's petition and motion for new trial herein; and the Court having heard said motion and arguments of counsel, and being fully advised in the premises;

It is hereby ordered, and this does order, that said motion be and the same is hereby overruled.

Done in open court this 24th day of June, 1912.

(Signed) FRANK H. RUDKIN,

Judge.

Endorsements: Order overruling motion for new trial.

Filed June 24, 1912.

WM. H. HARE, *Clerk.*

By FRANK C. NASH, *Deputy.*

No. 1586.

*In the District Court of the United States for the Eastern District of Washington, Northern Division.*McDONOUGH MANUFACTURING COMPANY, a
Corporation,*Complainant,**vs.*M. A. PHELPS LUMBER COMPANY, a Corpora-
tion,*Defendant.*

NOTICE.

*To the Above Named Complainant and to Messrs. Mc-
Carthy & Edge, Your Attorneys*

Please take notice that the defendant will file in the office of the Clerk of the above Court its proposed bill of exceptions, a copy of which is hereto attached, and will ask the Court to certify the same as the bill of exceptions in this case.

DANSON, WILLIAMS & DANSON,

Attorneys for Defendant.

Endorsements: Notice and proposed bill of exceptions.

Service of the above, together with copy of the proposed bill of exceptions, admitted this 30th day of April, 1912.

McCARTHY & EDGE,

Attorneys for Complainant.

Filed May 9th, 1912.

W. H. HARE, *Clerk.*By F. C. NASH, *Deputy.*

In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. 1586.

AT LAW.

MCDONOUGH MANUFACTURING COMPANY, a
Corporation,

Complainant,

v/s.

M. A. PHELPS LUMBER COMPANY, a Corporation,
tion,

Defendant.

BILL OF EXCEPTIONS.

BE IT REMEMBERED that on the trial of this cause in this Court in the April term, A. D. 1912, of said Court, the Hon. Frank H. Rudkin presiding, the following proceedings were had:

A jury was empanelled and sworn according to law on April 15, 1912, complainant and defendant being both present and represented by their attorneys and witnesses. Complainant introduced in evidence the notes described in the bill and introduced evidence showing the execution of said notes by defendant, and that complainant was the owner of said notes. It was admitted in open court by defendant that complainant was a corporation as alleged in the bill. In the course of defendant's case it introduced evidence tending to show that after the fore part of January, 1911, at all times it was ready to receive the machinery contracted for and that its mill building had reached a state of completion where it was ready for the installation of the machinery; also that it had done all in its power for the purpose of reducing and minimizing

the damages which it would sustain by any breach of the contract on the part of complainant not furnishing the machinery within the time contracted. It appeared that the contract for the machinery was finally concluded November 12, 1910, except as to certain extras ordered thereafter, and provided for shipment of the machinery on or about March 15, 1911.

Defendant offered in evidence the writing set out as an exhibit to the answer, bearing date Sept. 15, 1910, in which the following additional words appeared, following the words, "if desired," in the second paragraph, to-wit: "All as per specifications No. 10915 attached." There was evidence introduced that these words were inserted with defendant's consent on Nov. 12, 1910.

Defendant also offered in evidence document entitled "Specifications No. 10915," covering ————— pages of typewritten matter, mostly specifications of items of machinery, and in which specifications at the end thereof the following appeared:

"No. 10915.

"Two (2) 72"x18' Muskegon Boilers with steel settings as per their specification in No. 1371, together with one Duplex Feed Water Pump for the two boilers as above.

One (1) McDonough Heavy Duty rock valve engine, 20"x30". All necessary valves and piping, necessary in connecting up all water and steam appliances of every kind, furnished by the McDonough Mfg. Co., including all exhaust, whistle and blowoff pipes, also all necessary valves of approved make, including necessary valves and pipe for disconnecting one boiler from the other so

that either boiler can be used independently from the other."

"One Boiler House Conveyor Pan 12 ft. wide, with spouts and dampers for a 2 72" boiler with steel settings."

"The McDonough Manufacturing Co. is also to furnish all bolts and washers necessary to properly install said machinery, including tighteners, also all iron necessary to be used in connection with the conveyor and transfer system, also all iron for log slip, log deck and sorting table."

"No. 10915.

"TERMS: Freight cash on receipt of B/L—One-half invoice price of each car within five (5) days from arrival of shipment, balance covered by notes running ninety (90) days, bearing interest at the rate of seven (7) per cent; said notes to be executed and delivered within five (5) days from arrival of each shipment, and each note renewable three times or so as to become ultimately due in one (1) year, except last car, which payments shall be made as above twenty (20) days from arrival of last car.

Shipments to begin February 15, 1911, and be completed about March 15, 1911.

McDONOUGH MFG. CO.

By J. W. Hubbard,
Prest.

M. A. PHELPS LUMBER CO.

By M. A. Phelps.
Wm. McIntyre."

Defendant also offered in evidence letters written to and received from McDonough Manufacturing Company between Sept. 15, 1910, and Nov. 4, 1910, inclusive, relating to the claim of defendant as to the agreements of the parties concerning the furnishing of machinery.

Defendant also offered in evidence many letters written to and received from McDonough Manufacturing Company by defendant, among which were the following:

Letter from McDonough Manufacturing Company of Dec. 5, 1910, of which the following is a part:

"We would suggest that you discuss the boiler proposition thoroughly with him (McIntyre), and if any suggestions are to be made, advise us as early as possible, so that the whole matter can be put up to the boiler people in a definite form."

Letter of defendant to complainant, of date Jan. 9, 1910, of which the following is a part:

"We enclose blue print showing the position in which our boilers will be set. Please get out the setting plans and forward them as soon as possible."

Letter from defendant to complainant of date Jan. 16, 1911, of which the following is a part:

"You doubtless have received the blue print showing the plan of the power house, which we sent you some time ago."

Letter from defendant to complainant of date Feb. 25, 1911, of which the following is a part:

"We have your letter of the 22nd, and in reply to same, would say, in regard to boiler proposition, that you

are incorrect in your statements of the cost of the boilers. You have figured the freight on the additional boilers at 75000 lbs., which is about the weight of the two boilers. In the Muskegon proposition of September 14th, they quote us on the two boilers, which we originally figured on, at \$4350.00 F. O. B. Cusick, erected. And if we did the erecting would deduct \$500.00, leaving it \$3850 F. O. B. Cusick for the boilers. This price is substantially what you figured for the boilers. Taking the \$4350.00 as a basis on the two boilers, and adding one-half as much more for the other boiler, or \$2175.00, would bring the price to \$6525.00, or \$5.00 less than your proposition on the three boilers. Taking the two boilers without setting at \$3850, as included in our contract, and add \$750.00 for the erection and setting, would make \$2675 for extra boiler. There would be, however, some deductions from this, as you only figured \$450.00 for the erecting instead of \$750.00. In addition to this you would have been entitled to charge us the extra cost of piping, valves, etc., necessary to use in connection with the three boilers, also an extra length of the conveyor feed pan across the extra boiler. The extra size of the feed water pump has already been arranged for. Please look this matter up and see if we are not correct in our figures.

Please give the boiler matter your immediate attention. We will advise you in regard to the boiler feed conveyor, but we feel sure that the drawings which you submitted are all right."

Letter from complainant to defendant of date Apr. 6, 1911, of which the following is a part:

"We are in receipt of advice from the Muskegon Boiler Works that the boilers are going forward. . . ."

Letter from complainant to defendant of date Apr. 10, 1911, of which the following is a part: .

"The first shipment of boilers has already gone forward, and we are right after the boiler people to rush out balance with the least possible delay."

M. A. Phelps, a witness on behalf of defendant, testified in part as follows:

"By Mr. WILLIAMS:

Q. Now, Mr. Phelps, at this time when Mr. Hubbard was there when these specifications were signed, what, if anything, was done with reference to any additional boiler being furnished?

A. Well, he had a conversation with regard to an additional boiler.

Q. Did you have any agreement at that time as to how many additional ones were to be furnished?

A. I don't think so; right at that time.

Q. I mean before he left?

A. I think he agreed on three.

The COURT: What was the date of this

Mr. WILLIAMS: This document is not dated. Mr. McCarthy said this morning it was signed, he thought, on the 12th, and I said in my statement to the jury it was somewhere between the 6th and 18th of November."

One Alex Brown, a witness on behalf of defendant, testified in part as follows:

By Mr. WILLIAMS:

Q. Mr. Brown, I will ask you this question: What would be the reasonable time for furnishing an extra

boiler, together with the breeching that goes with the boiler, so as to change the installation of the boiler from a two battery to a three battery, the boiler being seventy-two inches by eight feet?

A. Do you mean after the boiler was on the ground?

Q. No, the construction of it so as to be ready to deliver?

A. Construction of the boiler Do you mean the construction of the boiler proper?

Q. Yes.

A. Well, two months ought to be a reasonable time.

After defendant had rested plaintiff called as a witness J. W. Hubbard, President of the Complainant, and in the course of his testimony the following occurred:

QUESTIONS BY MR. McCARTHY, Attorney for complainant:

Q. All right, Mr. Hubbard, you may state what caused the delay in the shipment of the machinery mentioned in the contract of November 12th.

Mr. WILLIAMS, Attorney for defendant: Just one moment. I want to interpose an objection as incompetent, irrelevant and immaterial, not an issue in the case. There is no attempt here in the pleadings to formulate any excuse or show anything except a general denial that they did fail to furnish the machinery within the time specified.

Mr. McCARTHY: If the delay is not an issue in the case, if Mr. Williams is willing to concede that——

Mr. WILLIAMS: Your excuse, I am referring to. I am not referring to what you did. We have alleged they failed to furnish the machinery in the time stipu-

lated. They have denied that. That is all there is in issue, as I can see it, under the pleadings as drawn.

The COURT: I will hear from you on that question.

Mr. McCARTHY: In other words, Mr. Williams says it is admitted that the delay took place and it is up to us to show a reason or excuse."

The COURT: No, his objection is that you cannot show an excuse without pleading it.

Mr. McCARTHY: Without pleading it?

The COURT: That is the objection he urges at this time.

Mr. McCARTHY: I can show a contract, any contract different from the one he has pleaded, and every portion of it.

The COURT: Yes.

The COURT: Wait until I read the reply. I think I will admit the testimony in rebuttal of testimony you have offered, regardless of the pleadings.

Mr. WILLIAMS: Allow us an exception; and may this objection go to all of this character of testimony without renewing the objection.

The COURT: Yes.

(Question read).

A. Well, at the time this order was drawn up it specified two boilers. After it was drawn up Mr. Phelps asked us—said he that he would use—decided afterwards that he would use three boilers instead of two and asked us to get a proposition from the Muskegon Boiler Works on three boilers instead of two, increasing it one-half. We immediately started to get this and we got the boiler proposition after about 30 days from the Muskegon

Boiler Works, and sent it to Mr. Phelps. He accepted it some time later, as shown in the correspondence. I don't remember how much later. And the contract says also that the drawings were to be made subject to Mr. Phelps' approval. They changed the boiler room entirely. It increased the size of it and increased the bridging, it increased the steel casing, which was a special steel casing made around this boiler, and added another boiler to the equipment; and as soon as we got this boiler proposition we asked Mr. Phelps to check it over.

Mr. WILLIAMS: It is evident that that is in writing and we object on the ground that the writing is the best evidence.

The COURT: As long as he states the contents of these writings correctly we will get through a lot quicker if you will overlook these captious objections.

* * * * *

The COURT: Proceed with the examination.

Mr. McCARTHY: Q. Just proceed, Mr. Hubbard.

A. On December 19th we asked Mr. Phelps to rush the boiler information——

Mr. WILLIAMS: Now——

The COURT: I will sustain the objection unless you refer to the letters.

Q. How did the information concerning the construction of the boilers delay the shipment of the machinery?

A. Why, they couldn't build the boilers without this information.

Q. And when was the information finally furnished by Mr. Phelps?

A. Well, as late as February 25th, we wrote him requesting his approval of the boiler plans.”

After the conclusion of the evidence the jury were addressed by attorneys for the complainant and defendant, and thereupon the Court instructed the jury and, among others, gave the following instruction, to which no exception was taken:

“The last item of damage is a claim for demurrage by reason of delay on the part of the plaintiff in furnishing and delivering the material and machinery within the time specified in the contract, which is, about March 15th, 1911. Inasmuch as the contract does not fix a definite and specific date for its performance you will have to fix the date from the testimony, under the rules of law which I will lay down for your guidance.

“The word ‘about’ is a relative term which may indicate one thing when applied to one state of facts, and another thing under different circumstances. It is an ordinary word, however, of no artificial meaning or technical signification, and should receive the rendering which is given to it in common parlance. It commonly denotes nearness or proximity in degree, quality, quantity, performance, place or time. The use of the word gives a margin for a moderate excess in, or diminution of, the time mentioned or intended and negatives the idea that exact precision was intended. It imports that the actual time is a fair approximation to that mentioned. In determining what is meant by the term, ‘About March 15th, 1911,’ you have a right to take into consideration the situation of the parties, and all the surrounding circumstances, and the construction which the parties

themselves have placed upon the term, if any such construction appears from their letters or from other sources in the testimony.

Proceeding further, the Court instructed the jury with reference to excuses on complainant's part for failure to deliver the machinery within the time contracted and exceptions were taken by defendant and allowed as follows:

"After you have determined the outside date at which this machinery could be delivered within the terms of the contract, and within the contemplation of the parties, you will next determine whether the defendant is entitled to offset damages for the delay beyond the date of performance. In determining this question you have a right to take into consideration all the facts and circumstances in the case; you have a right to consider the cause or causes of the delay, and everything in evidence that will throw light upon that question. If you find that there was a delay caused by the failure of the plaintiff to perform its contract, and that such delay has not been acquiesced in by the defendant, it will be entitled to recover damages occasioned by such delay."

To which instruction, and each and every part thereof, defendant at the time duly excepted and exception was allowed by the Court.

In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. 1586.

AT LAW.

McDONOUGH MANUFACTURING COMPANY, a
Corporation,

vs.

M. A. PHELPS LUMBER COMPANY, a Corporation.
tion.

ORDER.

This cause having come on regularly to be heard upon bill of exceptions as proposed by defendant and amendments thereto proposed by the plaintiff, and the plaintiff appearing by Messrs. McCarthy & Edge, its attorneys, and the defendant appearing by Messrs. Danson, Williams & Danson, its attorneys,

IT IS BY THE COURT ORDERED that the foregoing bill of exceptions is correct in all respects and is hereby settled and allowed as the true bill of exceptions herein, including the amendments allowed, and is hereby approved, allowed and settled and made a part of the record herein.

Dated at Spokane, Washington, this 10th day of June, 1912.

(Signed) FRANK H. RUDKIN,
Judge.

Endorsements: Bill of exceptions.

Received a copy of the within bill of exceptions at Spokane, Wash., this 4th day of June, 1912.

McCARTHY & EDGE,
Attorneys for Plaintiff.

Filed June 10, 1912.

W. H. HARE, *Clerk.*

By F. C. NASH, *Deputy.*

In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. 1586.

AT LAW.

McDONOUGH MANUFACTURING COMPANY, a
Corporation,

Complainant.

vs.

M. A. PHELPS LUMBER COMPANY, a Corporation,
tion,

Defendant.

ASSIGNMENT OF ERRORS.

Plaintiff in error herein, the defendant, M. A. Phelps Lumber Company, a corporation, hereby assigns the following errors committed by the trial court:

1. The District Court erred in entering judgment for complainant herein for the sum of \$2883.69, with interest and costs upon the verdict of the jury herein, and erred in entering judgment on said verdict.

2. The District Court erred in overruling defendant's objection to the following question asked complainant's witness, J. W. Hubbard, and in permitting the witness to answer:

"Q. All right, Mr. Hubbard, you may state what caused the delay in the shipment of the machinery mentioned in the contract of Nov. 12th."

"A. Well, at the time this order was drawn up it specified two boilers. After it was drawn up Mr. Phelps asked us—said he that he would use—decided afterwards that he would use three boilers instead of two and asked us to get a proposition from the Muskegon Boiler Works on three boilers instead of two, increasing it one-half. We immediately started to get this and we got the boiler proposition after about 30 days, from the Muskegon Boiler Works, and sent it to Mr. Phelps. He accepted it some time later, as shown in the correspondence. I don't remember how much later. And the contract says also that the drawings were to be made subject to Mr. Phelps' approval. They changed the boiler room entirely. It increased the size of it and increased the bridging, it increased the steel casing, which was a special steel casing made around this boiler, and added another boiler to the equipment; and as soon as we got this boiler proposition we asked Mr. Phelps to check it over."

3. The District Court erred in giving the following instructions to the jury:

"After you have determined the outside date at which this machinery could be delivered within the terms of the contract, and within the contemplation of the parties, you will next determine whether the defendant is entitled to offset damages for the delay beyond the date of performance. In determining this question you have right to take into consideration all the facts and circumstances in the case; you have a right to consider the cause or causes of the delay, and everything in evidence that will throw light upon that question. If you find that there was a delay caused by the failure of the plaintiff to per-

form its contract, and that such delay has not been acquiesced in by the defendant, it will be entitled to recover damages occasioned by such delay.”

4. The District Court erred in overruling the demurrer to the complaint.

5. The District Court erred in overruling defendant's motion for new trial.

WHEREFORE, defendant and plaintiff in error prays that the judgment of said Court be reversed and such directions be given that full force and efficacy may enure to defendant by reason of the defense set up in its answer and amended answer filed in said cause.

(Signed) DANSON, WILLIAMS & DANSON,
Attorneys for Defendant and Plaintiff in Error.

In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. 1586.

AT LAW.

McDONOUGH MANUFACTURING COMPANY, a
Corporation,

Complainant,

v's.

M. A. PHELPS LUMBER COMPANY, a Corporation,
tion,

Defendant.

M. A. Phelps Lumber Company, a corporation, defendant in the above entitled cause, feeling itself aggrieved by the verdict of the jury and the judgment en-

tered on the 25th day of April, 1912, comes now by Danson, Williams & Danson, its attorneys, and petitions said Court for an order allowing said defendant to prosecute a writ of error to the Honorable United States Circuit Court of Appeals for the Ninth Circuit under and according to the laws of the United States in that behalf made and provided, and also that an order be made advising the amount of security which the defendant shall give and furnish upon said writ of error and upon giving of such security all further proceedings in this Court be suspended and stayed until determination of said writ of error by the United States Circuit Court of Appeals for the Ninth Circuit.

And your petitioner will ever pray.

(Signed) DANSON, WILLIAMS & DANSON,

Attorneys for Defendant.

On consideration of the foregoing petition and assignment of errors attached thereto, the Court does allow the writ of error of the defendant, M. A. Phelps Lumber Co., a corporation, upon giving bond according to law in the sum of \$4000.00, which shall also operate as a supersedeas bond.

Dated this 6th day of July, 1912.

(Signed) FRANK H. RUDKIN,

Judge.

Endorsements: Petition and assignment of errors and order allowing writ of error and fixing bond.

Received a copy of the within petition for writ of errors, assignment of errors and order allowing writ of

error and fixing bond at Spokane, Wash., this 6th day of July, 1912.

McCARTHY & EDGE,
Attorneys for Plaintiff.

Filed July 6, 1912.

WM. H. HARE, *Clerk.*

By S. M. RUSSELL, *Deputy.*

*In the United States Circuit Court of Appeals for the
Ninth Circuit.*

No. 1586.

AT LAW.

McDONOUGH MANUFACTURING COMPANY, a
Corporation,

Complainant,

vs.

M. A. PHELPS LUMBER COMPANY, a Corpora-
tion,

Defendant.

WRIT OF ERROR.

LODGED COPY.

THE UNITED STATES OF AMERICA,
NINTH JUDICIAL CIRCUIT—ss.

*THE PRESIDENT OF THE UNITED STATES to
the Honorable The Judges of the District Court of
the United States for the Eastern District of Wash-
ington, Northern Division, Greeting:*

Because of the record and proceedings as also in the rendition of the judgment of a plea which is in the said District Court before you, or some of you, between McDonough Manufacturing Company, a corporation, com-

plainant and defendant in error, and M. A. Phelps Lumber Company, a corporation, defendant and plaintiff in error, a manifest error hath happened to the great damage of the said M. A. Phelps Lumber Company, a corporation, plaintiff in error, as by its complaint appears, we being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you that if judgment be therein given, that then, under your seal, distinctly and openly you send the record and proceedings aforesaid, with all things concerning same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the city of San Francisco, in the State of California, on the 5th day of August next, in the said Circuit Court of Appeals, to be then and there held that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

WITNESS the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, the 6th day of June, in the Year of Our Lord One Thousand Nine Hundred Twelve.

(Signed) W. H. HARE,

*Clerk of the United States District Court for the Eastern
District of Washington, Northern Division.*

(SEAL U. S. DISTRICT COURT.)

Allowed by Frank H. Rudkin, District Judge.

Endorsements: Writ of Error (Lodged Copy).

Filed July 8th, 1912.

WM. H. HARE, *Clerk.*

By FRANK C. NASH, *Deputy.*

No. 1586.

AT LAW.

In the District Court of the United States for the Eastern District of Washington, Northern Division.

McDONOUGH MANUFACTURING COMPANY, a Corporation,

Complainant,

vs.

M. A. PHELPS LUMBER COMPANY, a Corporation,

Defendant.

KNOW ALL MEN BY THESE PRESENTS, That we, M. A. Phelps Lumber Company, a corporation organized and existing under and by virtue of the laws of the State of Washington, as principal, and M. A. Phelps and J. F. Sexton, as sureties, are held and firmly bound unto McDonough Manufacturing Company, a corporation, complainant above named, in the sum of \$4000.00, to be paid to the said McDonough Manufacturing Company, a corporation, its successors and assigns, to which payment well and truly to be made we bind ourselves, and each of us, jointly and severally, and our and each of our successors, representatives, administrators and assigns, firmly by these present.

Sealed with our seals and dated the 6th day of June, A. D. 1912.

WHEREAS, the above mentioned defendant, M. A. Phelps Lumber Company, a corporation, has sued out a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the judgment in the above entitled cause by the District Court of the United States for the Eastern District of Washington, Northern Division.

NOW, THEREFORE, the condition of this obligation is such that if the above named principal shall prosecute said writ to effect and answer all damages and costs if it shall fail to make its plea good, then this obligation shall be void, otherwise to remain in full force and virtue. This bond to also operate as a supersedeas bond.

(CORPORATE SEAL M. A. PHELPS LUMBER CO.)

M. A. PHELPS LUMBER COMPANY.

(Signed) M. A. Phelps,
President.

(Signed) M. A. Phelps,
J. F. Sexton,

Sureties.

The foregoing bond is hereby approved and shall also operate as a supersedeas bond.

Done at Spokane, Washington, this 6th day of July, 1912.

(Signed) FRANK H. RUDKIN,
*District Judge for the Eastern District of Washington,
Northern Division.*

Endorsements: Bond on Writ of Error.

Received a copy of the within bond at Spokane, Wash.,
this 8th day of July, 1912.

McCARTHY & EDGE,
Attorneys for Complainant.

Filed July 8, 1912.

WM. H. HARE, *Clerk.*

By FRANK C. NASH, *Deputy.*

No. 1586.

AT LAW.

*In the District Court of the United States for the East-
ern District of Washington, Northern Division.*

McDONOUGH MANUFACTURING COMPANY, a
Corporation,

Complainant,

vs.

M. A. PHELPS LUMBER COMPANY, a Corpora-
tion,

Defendant.

CITATION. (LODGED COPY.)

UNITED STATES OF AMERICA—ss.

*THE PRESIDENT OF THE UNITED STATES to
the McDonough Manufacturing Company, a Cor-
poration, Greeting:*

You are hereby cited and admonished to be and ap-
pear at the United States Circuit Court of Appeals for
the Ninth Circuit, to be holden at the City of San Fran-
cisco and the State of California on the 5th day of Au-
gust, 1912, pursuant to a writ of error allowed in the
above entitled case and entered in the Clerk's office of
the District Court of the United States for the Eastern

District of Washington, Northern Division, in that case numbered 1586, in which McDonough Manufacturing Company, a corporation, is the complainant, and M. A. Phelps Lumber Company, a corporation, is the defendant and appellant, to show cause, if any there be, why the judgment rendered against the said defendant and appellant as in the said order allowing Writ of Error mentioned, should not be granted and why speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States of America, this 6th day of July, A. D. 1912, and the Independence of the United States One Hundred Thirty-sixth.

(Signed) FRANK H. RUDKIN,

Judge.

(SEAL U. S. DISTRICT COURT.)

Endorsements: Citation. (Lodged Copy).

Filed July 8, 1912.

W. H. HARE, *Clerk.*

By FRANK C. NASH, *Deputy.*

In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. 1586.

AT LAW.

McDONOUGH MANUFACTURING COMPANY, a
Corporation,

Complainant,

vs.

M. A. PHELPS LUMBER CO., a Corporation,

Defendant.

PRAECIPE FOR TRANSCRIPT.

To the Clerk of the Above Entitled Court:

You will please prepare transcript for writ of error to the Circuit Court of Appeals in the Ninth Judicial District, containing the following documents, to-wit:

1. Bill of Complaint.
2. Defendant's demurrer to bill of complaint.
3. Order overruling demurrer to bill of complaint.
4. Amended answer.
5. Replication.
6. Verdict of the jury.
7. Judgment.
8. Defendant's motion for a new trial.
9. Order overruling motion for new trial.
10. Bill of exceptions as certified by the Court.
11. Defendant's petition for writ of error, together with order of the Court allowing same and fixing super-sedeas bond.
12. Assignments of error.
13. Bond.
14. Citation with return of service.

15. Writ of error.
16. Praeipie of record.
17. Notice of filing proposed bill of exceptions.

DANSON, WILLIAMS & DANSON,
Attorneys for Defendant.

Endorsements: Praeipie for transcript.

Received a copy of the within praecipe at Spokane, Wash., this 8th day of July, 1912.

McCARTHY & EDGE,
Attorneys for Complainant.

Filed July 8, 1912.

WM. H. HARE, *Clerk.*

By FRANK C. NASH, *Deputy.*

In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. 1386.

McDONOUGH MANUFACTURING COMPANY, a
Corporation,

Plaintiff,

vs.

M. A. PHELPS LUMBER COMPANY, a Corporation,

Defendant.

CLERK'S CERTIFICATE TO TRANSCRIPT OF
THE RECORD.

UNITED STATES OF AMERICA,
Eastern District of Washington—ss.

I, W. H. HARE, Clerk of the District Court of the United States for the Eastern District of Washington, do hereby certify that the foregoing printed pages num-

bered from 1 to 82 inclusive, plus 44 pages of inserts, to be a full, true, correct and complete copy of so much of the record, papers, exhibits and other proceedings in the above and foregoing entitled cause, as are necessary to the hearing of the writ of error therein, in the United States Circuit Court of Appeals for the Ninth Judicial Circuit, and as requested by praecipe to be transmitted to said United States Circuit Court of Appeals, as the same remains of record and on file in the office of the Clerk of said District Court, and that the same constitutes the record on writ of error from the order and judgment of the District Court of the United States for the Eastern District of Washington, Northern Division to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, San Francisco, California.

I further certify that I hereto attach and transmit the Original Writ of Error and Citation issued in this cause.

I further certify that the costs of preparing, certifying and printing the foregoing transcript is the sum of \$148.90, and that the said sum has been paid to me by Messrs. Danson, Williams & Danson, Attorneys for Plaintiff in Error.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the official seal of said District Court at Spokane, in said District, this 22nd day of July 1912.

(Signed) W. H. HARE,

(Seal)

Clerk.

IN THE
**United States Circuit Court of Appeals
for the Ninth Circuit**

M. A. PHELPS LUMBER COMPANY,
a Corporation,

Plaintiff in Error,

vs.

McDONOUGH MANUFACTURING
COMPANY, a Corporation,

Defendant in Error.

No.

*On Writ of Error to the United States District Court,
Eastern District of Washington, Northern Division.*

PLAINTIFF IN ERROR'S OPENING BRIEF

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IN THE

**United States Circuit Court of Appeals
for the Ninth Circuit**

M. A. PHELPS LUMBER COMPANY,

a Corporation,

Plaintiff in Error,

vs.

McDONOUGH MANUFACTURING

COMPANY, a Corporation,

Defendant in Error.

No.

*On Writ of Error to the United States District Court,
Eastern District of Washington, Northern Division.*

PLAINTIFF IN ERROR'S OPENING BRIEF

STATEMENT OF FACTS.

Plaintiff in error, M. A. Phelps Lumber Company, a corporation, was defendant in the court below. The action was brought by McDonough Manufacturing Company, a corporation, to recover upon certain promissory notes executed by plaintiff in error pursuant to a contract in which defendant in error agreed to furnish certain saw mill machinery and supplies (Transcript, 3). Plaintiff in error answered, admitting the execution of the notes and setting up as a defense to the action failure of consideration due to defendant in error's failure to

perform its contract. Plaintiff in error also counter claimed for damages suffered by reason of failure to perform (Transcript, 9-21). Defendant in error replied, denying that it failed to perform its contract (Transcript, 40.43).

On the trial of the issues the defendant in error was allowed by the court to introduce evidence over plaintiff in error's objections for the purpose of showing excuses for its failure to perform its contract within the time stipulated (Transcript, 65-67). The court instructed the jury that it had a right to consider such excuses (Transcript, 69). The action was brought for recovery of \$4500.24 (Transcript, 6). The plaintiff in error sought to recover by its counter-claim damages in the sum of \$26,800.00 (Transcript, 20). The jury returned a verdict in favor of the defendant in error for \$2883.69 (Transcript, 52), and judgment was entered accordingly (Transcript, 53).

ASSIGNMENT OF ERRORS

Plaintiff in error herein, the defendant, M. A. Phelps Lumber Company, a corporation, hereby assigns the following errors committed by the trial court:

I.

The District Court erred in entering judgment for complainant herein for the sum of \$2883.69, with interest and costs upon the verdict of the jury herein, and erred in entering judgment on said verdict.

II.

The District Court erred in overruling defendant's

objection to the following question asked complainant's witness, J. W. Hubbard, and in permitting the witness to answer:

"Q. All right, Mr. Hubbard, you may state what caused the delay in the shipment of the machinery mentioned in the contract of November 12th."

"A. Well, at the time this order was drawn up it specified two boilers. After it was drawn up Mr. Phelps asked us—said he that he would use—decided afterwards that he would use three boilers instead of two and asked us to get a proposition from the Muskegon Boiler Works on three boilers instead of two, increasing it one-half. We immediately started to get this and we got the boiler proposition after about 30 days, from the Muskegon Boiler Works, and sent it to Mr. Phelps. He accepted it some time later, as shown in the correspondence. I don't remember how much later. And the contract says also that the drawings were to be made subject to Mr. Phelps' approval. They changed the boiler room entirely. It increased the size of it and increased the bridging, it increased the steel casing, which was a special steel casing made around this boiler, and added another boiler to the equipment; and as soon as we got this boiler proposition we asked Mr. Phelps to check it over."

III.

The District Court erred in giving the following instructions to the jury:

"After you have determined the outside date at which this machinery could be delivered within the terms of the contract, and within the contemplation of the parties, you will next determine whether the defendant is entitled to offset damages for the delay beyond the date of performance. In determining this question you have

right to take into consideration all the facts and circumstances in the case; you have a right to consider the cause or causes of the delay, and everything in evidence that will throw light upon that question. If you find that there was a delay caused by the failure of the plaintiff to perform its contract, and that such delay has not been acquiesced in by the defendant, it will be entitled to recover damages occasioned by such delay."

IV.

The District Court erred in overruling defendant's motion for new trial.

WHEREFORE, defendant and plaintiff in error prays that the judgment of said court be reversed and such directions be given that full force and efficacy may enure to defendant by reason of the defense set up in its answer and amended answer filed in said cause.

ARGUMENT.

But one question is raised by the assignments of error and that is: Is matter introduced for the purpose of showing excuse or waiver of performance admissible under an averment of performance? (Denial of an allegation of non-performance, of course, amounts to an averment of performance.)

This question has been answered by many courts and without exception in the negative.

"Complaint is made of the rejection of certain evidence which plaintiffs in error claim showed a waiver of their obligation to furnish a minimum of 400,000 bushels and the substitution therefor of whatever quantity they might actually need during the season. But

there was no plea of waiver or modification, and so the evidence was properly rejected.”

Feuchtwanger vs. Manitowoc Malting Co., 187 Fed. 713-16.

“The action is in assumpsit, and the complaint contains two counts. * * * The defendant filed three pleas; the first being the general issue, and the second and third were special pleas to both counts of the complaint. * * * These breaches are particularly set out in the pleas. Another breach was the failure to complete the contract by the time stipulated, and a claim of five dollars per day for each day of delay as liquidated damage, * * *. Having joined issue upon the plea, if the evidence sustained it, the defendant was entitled to a verdict. The evidence showed without conflict that the work was not completed by the 18th of September, 1894. The plaintiffs offered to introduce evidence to show that they were not at fault in not completing the work by the time specified, which, upon objection, the court declined to admit. There was no error in this ruling. If the plaintiffs had replied to the plea, admitting the delay, and setting out the causes of delay in avoidance, and issue had been joined upon the replication, the evidence would have been admissible. No ruling of the court in excluding evidence not in rebuttal of evidence introduced in support of the plea can be held erroneous.”

Gerald vs. Tunstall (Ala.), 20 So. 43, 4 and 5.

“But, as a rule of pleading, if a party avers the performance of conditions only, he must prove performance upon the trial, and cannot succeed by proving waiver instead of performance. If he intends to rely upon and prove waiver, he must plead it.”

Eureka Fire & Ins. Co. vs. Baldwin (O.), 57 N. E. 57, 9.

“Plaintiff’s evidence to the effect that defendant, through Pierce, its president, agreed on June 5, 1903, to thereafter make weekly deliveries of the lumber, tended to prove a modification of the written contract, in respect to the time of delivery of the lumber. It is competent for parties to a written contract to verbally modify it; but it is not competent to prove such modification, without pleading it. * * * And the learned trial judge, in estimating the damages, based his estimate on the modification of the contract, as testified to by plaintiff, and thereby permitted a recovery on a cause of action not stated in the petition.”

Toussig vs. Southern Mill & Land Co. (Mo.), 101 S. W. 602, 6.

“As one of their defenses, defendants alleged, as a set-off, damages to the extent at least of the amount claimed in the complaint, resulting from plaintiff’s alleged breach of his contract to furnish twenty convicts each year. * * *

“It is excepted that the court erred in not permitting plaintiff, in reply, to state whether ‘Newell paid for the convicts for the years 1899, 1900, and the greater part of 1901.’ We think there was no error in this. The only breach of the contract alleged in the complaint was the failure of defendants to pay for the hire of convicts for November and December, 1901. It is contended, however, that the evidence was competent, in reply, to show that Newell had, by receiving and paying for less than twenty convicts, waived that stipulation in the contract authorizing the superintendent to furnish less than twenty convicts after the first year, * * *. The plaintiff’s action was based upon the contract, and the complaint contained no allegation that defendants had

waived any of its terms. * * *. It is true, this stipulation might be waived by defendant; but it is familiar law that in order for one party to recover of another party upon a mutual, dependent contract, the plaintiff must allege performance of all conditions precedent on his part, or, if he relies upon a waiver of any such stipulations, or excuse for non-performance on his part, he must allege such waiver or excuse. * * *. Neither in the complaint, nor by way of reply to defendant's set-off, is there any allegation of such waiver. * * *. The evidence proposed was not responsive to any issue raised by the pleadings, and was properly excluded."

Griffith vs. Newell (S. C.), 48 S. E. 259 and 260.

"The second count is upon a special contract in writing, a copy of which is annexed, and it is averred that the plaintiffs in all respects kept and performed all the covenants and agreements, express and implied, in said contract by them to be kept and performed. and that there remains unpaid the plaintiffs under said contract the sum of \$1728.25 etc. Plaintiffs offered the auditor's report and rested. The defendant offered evidence tending to show that the plaintiffs had not performed the contract. The plaintiffs in rebuttal offered evidence tending to show an acceptance of the work and materials as the substantial performance of the contract. * * *

* * * * *

"* * * On principle there cannot be a recovery upon an averment of performance in such a case, because the proof shows a variance.

"The acceptance of the work as a substantial performance of the contract, notwithstanding known omissions to do that which was required, is a waiver, and, upon an averment of performance, a plaintiff cannot recover by proof of a waiver."

Allen vs. Burns (Mass.), 87 N. E. 194 and 195.

“And as disclosed by the bill of exceptions there was evidence tending to show a waiver of a strict performance of the written contract, both as to unsound logs and as to piling the logs on the right-of-way, and those questions would all be for the consideration of the jury, if they were within the issues. But no such issue is tendered and the evidence was not offered for that purpose, but to prove a subsequent modification of the contract, which was not alleged; therefore it was incompetent for either. This objection was made by defendant from the commencement of the trial and insisted on throughout. Therefore we cannot treat it as though it were an issue.”

Williams vs. Mt. Hood Ry. & Power Co. (Ore.), 111 Pac. 17, 18.

“There was no allegation in the petition or in the reply of the plaintiff that warranted the introduction of this paper. The defendants pleaded the contract under which the loan was made, and set the same out, it being in writing, by attaching copies thereof to their answer. No mention is made in the pleadings anywhere of any alteration of the original contract. It was erroneously admitted, over the objections of the defendant.”

Pioneer Savings & Loan Co. vs. Kaspar (Kan.), 52 Pac. 623.

See also:

Duval vs. American Telephone etc. Co. (Wis.), 89 N. W. 482.

List & Son Co. vs. Chase (Oh.), 88 N. E. 120, 23.

White vs. Mitchell (Ind.), 65 N. E. 1061.

Newberger vs. Robbins (Utah), 106 Pac. 933, 35.

Polinski vs. First Natl. Bank (Tex.), 122 S. W. 276, 8.

R. L. Cox & Co. vs. J. H. Markham Jr. & Co. (Tex.), 87 S. W. 1163.

Hassard-Short vs. Hardison (N. C.), 23 S. E. 96, 7.
Heme Fire Ins. Co. vs. Burg (Neb.), 65 N. W. 780.
Ninman vs. Suhr (Wis.), 64 N. W. 1035.
Jefferson & N. W. Ry. Co. vs. Dreeson (Tex.), 96
 S. W. 63, 4.

The court thus states his reason for admitting the evidence:

“THE COURT: Wait until I read the reply. I think I will admit the testimony in rebuttal of testimony you have offered, regardless of the pleadings.” (Transcript, 66.)

Plaintiff in error submits that the record discloses no testimony introduced by it which would make such testimony admissible in rebuttal and even if properly admitted to rebut testimony offered by plaintiff in error, it was not properly allowed to go to the jury as showing an excuse for or waiver of failure to perform the contract.

In *Wilkinson Mfg. Co. vs. Welde* (Pa.), 46 Atl. 852, 53, suit was brought upon a written contract, the execution of which was denied by the defendants. On the trial the defendants introduced the real contract executed (it was different from that declared upon) in support of their defense. The court said:

“In making the same (defense) it is true that they did offer in evidence the real contract entered into, but plaintiff cannot take advantage of what they did, when it was simply to prove that they had not contracted as set forth in the pleadings.”

A late case in point is *Iola Portland Cement Co. vs. Ullman* (Mo.), 140 S. W. 620, 6, in which it is said:

“This is a plea of performance of all the conditions precedent, and, as under their contract the giving of shipping orders was a condition precedent, this allegation was the positive allegation that shipping orders were given for the whole amount of cement covered by the contract; and, having alleged it, they had no right of action on their counter-claim, except by proof of performance. In this court appellants seek to explain why shipping orders were not given for the entire amount of cement contracted for. Under a plea of performance, evidence tending to show a waiver of performance is not admissible. And, although appellants were permitted to introduce evidence tending to show an excuse for not ordering more cement, *the admission of such evidence cannot enlarge the scope of their pleadings*. The answer alleges performance, and they are bound by that allegation. A party's pleading is the only door through which he can introduce his evidence. A party suing for breach of a contract must allege and prove performance of all conditions precedent or he must allege and prove an excuse for their non-performance. He cannot rely on a waiver under a plea of performance.” (Italics ours.)

Under some code provisions a matter in confession and avoidance cannot be set out in the reply. Under such statutes it might be that evidence of an excuse for or waiver of a failure to perform a contract would be admissible. But such statutes are not general and decisions based upon them would have no bearing in view of the Washington statutory provision which reads as follows:

“When the answer contains new matter constituting a defense or counter-claim, the plaintiff may reply to such new matter, denying generally or specifically each alle

gation controverted by him, or any knowledge or information thereof sufficient to form a belief; and he may allege in ordinary and concise language, without repetition, any new matter, not inconsistent with the complaint, constituting a defense to such new matter in the answer."

Remington & Ballinger's Annotated Codes and Statutes of Washington, Section 277.

We respectfully submit that the court erred in allowing the admission of the evidence in question and in instructing the jury in the matter complained of to plaintiff in error's prejudice, and the case should be reversed and a new trial ordered.

DANSON, WILLIAMS & DANSON,
Attorneys for Plaintiff in Error.

Spokane, Washington.

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BRIEF OF DEFENDANT IN ERROR.

McCARTHY & EDGE,
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Spokane, Washington.

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BRIEF OF DEFENDANT IN ERROR.

McCARTHY & EDGE,

Attorneys for Defendant in Error.

Spokane, Washington.

STATEMENT OF FACTS.

The transcript recites (Transcript 60) that the contract was finally concluded on November 12, 1910. It also recites (Transcript 60) the following:

“Defendant offered in evidence the writing set out as an exhibit to the answer, bearing date Sept. 15, 1910, in which the following additional words appeared, following the words, “if desired,” in the second paragraph, to-wit: “All as per specifications No. 10915 attached.” There was evidence introduced that these words were inserted with defendant’s consent, on Nov. 12, 1910.

“Defendant also offered in evidence document entitled “Specifications No. 10915 * * *.”

The instrument bearing date September 15, 1910, together with the “Specifications No. 10915,” became, on November 12, 1910, the contract as it was of that date.

“Certain extras ordered thereafter” (Transcript 60), including a boiler and equipment, were directed to be constructed into and upon (Transcript 63, 65) the machinery covered by the previous order, and the vendor was also directed to perform the setting and installation of that part of the machinery consisting of a battery of boilers. All this was shown by evidence put in by plaintiff in error in its case in chief. And it also then introduced evidence (Transcript 64) to show the time reasonably made necessary by these alterations or new contracts.

ARGUMENT.

No error was committed in the admission of the testimony or the giving of the instruction of which complaint is made, for the following reasons:

First: Because the evidence was proper under the pleadings.

Second: Because plaintiff in error having opened up the question, testimony in rebuttal was proper.

Third. Because error, if committed, was not prejudicial to plaintiff in error.

FIRST: The testimony of which complaint is made was proper as showing that there was in fact no delay within the meaning of the contract. The contract of November 12, by its terms, expressly recited the fact that delivery was made to depend upon causes "beyond" the "control" (Transcript 22) of defendant in error, and also to depend upon complete information to be furnished by the purchaser (Transcript 22). These were two contingencies upon which the date of the delivery depended—one dependent on outside causes, and the other was a duty undertaken by the purchaser itself.

(a) Plaintiff in error was therefore informed by the terms of the contract, that the defendant in error reserved the right to show that delivery could not have been made on account of a cause or causes beyond its

control. When, therefore, plaintiff in error proved the original contract, it proved one in which defendant in error undertook to perform at a given time, *subject to causes beyond its control*.

That these excepted causes may be shown under a general denial where such statement is contained in the contract, is, we believe, a general rule; but in any event the pleadings in this case are to be measured by the laws of Washington, and as to what the law of that state is, we submit the following decision:

“It is assigned that the court erroneously instructed the jury to the effect that if the obstruction of the street was continued by reason of the failure of the steel company to furnish the necessary steel, and not because of any lack of diligence on respondent’s part, then appellant could not recover. The evidence showed that respondent had promptly contracted with the American Bridge Company to furnish the structural steel required by the plans approved by the city for use in this bridge. That company was shown to be probably the best-equipped one in the entire country. The testimony was not contradicted that such material as was required for this bridge is not kept in stock by any company, but must be manufactured under special order, according to plans submitted. There was no showing in the evidence that the manufactured material could have been procured at an earlier date from any other source. There was also evidence to the effect that the delay of the

manufacturing company was due to strikes and labor troubles, and that element was also made a feature of the instructions of the court in connection, now under consideration. The respondent had been delegated by the city to do this work, and no time was specified within which it should be done. It was therefore under obligation to finish the structure within a reasonable time. It applied to probably the best recognized source for obtaining the manufactured material—a material which respondent itself was not prepared to manufacture, and which must have been known to the city at the time it delegated respondent to do the work. There was testimony that the work was forwarded with dispatch, with the exception of that portion thereof which required the steel, and that the delay was really due to the failure of that material to arrive. Appellant urges that respondent cannot be excused for any delay beyond the reasonable time required for the actual constructive work, and that the only excuse that can be offered for failure to perform a public duty must be the act of God or the public enemy. Such a harsh rule, applied to a case of this kind, cannot be the law. Appellant invokes the rule adopted in *Herrman v. Great Northern Ry. Co.*, 27 Wash. 472 (68 Pac. 82, 57 L. R. A. 390), which is to the effect that one cannot evade liability because of the neglect of another to whom certain duties have been delegated by him, for the reason that the primary liability rests with the one who has delegated the neglectful party. There, however, the duty neglected by the delegated party was such as, in its nature, could have been easily discharged by the one primarily liable, and the rule

its road or roads. When the plaintiff offered his evidence as to his transportation and the tickets in connection therewith, under the denial of the defendant, it was competent for it to offer in evidence any material matter to defeat the alleged contract, or to show a different contract. The fourth separate answer to the complaint, and as new matter constituting third affirmative defense, to which a demurrer by the plaintiff was sustained, and the same plea was finally amended, and to which a reply was filed, was an attempt on the part of the defendant to plead its version of the alleged contract. It added nothing to the denial already made. This defense cannot be construed as doing more than the denial. *Puget Sound Iron Co. vs. Worthington*, 2 Wash. T. 483 (7 Pac. 882, 886) and *Williams v. Ninemire*, ante, p. 393."

It is conceded that these notes were given in payment for material covered by the subsequent orders, as well as the contract of November 12, 1910. Now since such was the case, and since a party may prove a different contract, any contract, under a general denial the plaintiff in error certainly had within the pleadings the right to prove all contracts that made up the consideration of the notes.

SECOND: The admission of the testimony complained of was not error, for the reason that plaintiff in error itself first opened up the subject of alterations of the original contract and the making of a new contract or

contracts for additional machinery, and for "erecting and setting." It then proceeded to show the time reasonably made necessary thereby, and, having done so, defendant in error had the right to have admitted the testimony of which complaint is made, for the additional reason, as suggested by the trial court, that it was "in rebuttal of testimony you (plaintiff in error) have offered." The original contract (Transcript 22, 60), and which plaintiff put in evidence in its case in chief, provided, among other things, for

"Two (2) 72' x 18' Muskegon Boilers with steel settings as per their specifications No. 1371, together with one Duplex feed water pump for the two boilers as above."

Plaintiff in error then proceeded to put in evidence, among other things, a letter written by its president under date of Feb. 25, 1911 (Transcript 62, 63), which contained the following:

"Taking the \$4350.00 as a basis on the two boilers, and adding one-half as much more for the other boiler, or \$2175.00, would bring the price to \$6325.00, or \$5.00 less than your proposition on the three boilers. Taking the two boilers without setting at \$3850.00, as included in our contract, and add \$750.00 for the erection and setting, would make \$2675.00 for extra boiler. There would be, however, some deductions from this, as you only figured \$450.00 for the erecting, instead of \$750.00. In

addition to this, you would have been entitled to charge us the extra cost of piping, valves, etc., necessary to use in connection with the three boilers, also an extra length of the conveyor feed pan across the extra boiler. The extra size of the feed water pump has already been arranged for."

Thus admitting and introducing evidence in its case in chief, acknowledging alterations and the ordering of additional machinery and equipments, and the "erection and setting" of a battery of boilers, it then produced a witness whose testimony, in part (Transcript 64, 65), was as follows:

"Mr. Brown, I will ask you this question: What would be the reasonable time for furnishing an extra boiler, together with the breeching that goes with the boiler, so as to change the installation or the boiler from a two battery to a three battery, the boiler being seventy-two inches by eighteen feet?

A. Do you mean after the boiler was on the ground?

Q. No, the construction of it so as to be ready to deliver?

A. Construction of the boiler. Do you mean the construction of the boiler proper?

Q. Yes.

A. Well, two months ought to be a reasonable time."

The rule admitting testimony in rebuttal is so well established that citation of authority is unnecessary, and the general rule is set forth in 10 Enc. of Ev., at pg. 643, as follows:

“Frequently, however, evidence becomes relevant on rebuttal by reason of the defenses interposed by defendant in his original case, that would not have been relevant on complainant’s original case. Moreover, if the defendant in making his defense puts in evidence illegal for any cause, the complainant in rebuttal may properly rebut it by other evidence of like illegality; thus, if the defendant’s evidence is irrelevant or incompetent, it is proper to rebut it with evidence of similar irrelevancy or incompetency. In some jurisdictions the introduction of such evidence seems to be a right of the complainant, while in others its admission is discretionary with the trial court.”

Also in 3 Cyc. 245, as follows:

“A party who introduces incompetent evidence, or evidence inadmissible under the pleadings, will not be permitted to assign as error the subsequent admission of the same evidence, similar evidence or rebuttal evidence offered by his adversary.”

THIRD: Plaintiff in error cannot complain of the ruling of this trial court because error, if committed at all, was not prejudicial to it.

“A third requisite of a valid appeal is that the the appellant should have been aggrieved by the judgment or decree complained of.”

2 Cyc. 631.

That the error was not prejudicial to plaintiff in error is apparent for three reasons:

(a) As shown by the statement of facts above, the instrument bearing date September 15, 1910, and adopted as part of the contract of November 12, 1910, contained the following (Transcript 23):

“The unloading of machinery when received shall constitute a waiver of any claim for damage from delay.”

The plaintiff in error did not claim, and the transcript does not recite, that it refrained from or refused to unload or accept the machinery. On the contrary, it admits in its cross-complaint (Transcript 24, 25) that it did receive and unload same. It would seem, then, that so far as damages for delay are concerned, that plaintiff in error in its own case in chief, proved itself out of court so far as concerned the item for damages on account of delay.

(b) The error was not prejudicial for another reason, namely: that plaintiff in error was in no manner thereby taken by surprise or hampered in the presentation of its case. That this is true is shown by testimony it had itself introduced in its case in chief, and before the alleged error occurred. Among its testimony may be

noted letters containing the claim of defendant in error that shipment of the boilers was being controlled by the Muskegon Boiler Works, a concern independent of defendant in error. The contract fixed the time of delivery expressly "subject to strikes, and other delays beyond your (defendant in error's) control." Plaintiff in error could not have been taken by surprise when it had in its possession these letters. The letter of April 6, 1911 (Transcript 64), written by defendant in error to plaintiff in error, contained the following:

"We are in receipt of advice from the Muskegon Boiler Works that the boilers are going forward

* * *

Also its letter of April 10, 1911 (Transcript 64):

"The first shipment of boilers has already gone forward, and we are right after the boiler people to rush out balance with the least possible delay."

These letters informed plaintiff in error as strongly as any pleading could inform it, the one reason (aside from plaintiff in error's own conduct) assigned by defendant in error for the alleged delay. The purpose of pleadings is chiefly to define the issues, and to guard against surprise at trial. When a party has had a fair day in court, courts will not put the successful party to the burden and expense of a retrial to cure an error that was not prejudicial.

(c) The ruling and instruction, if erroneous, were not prejudicial to plaintiff in error, for a third reason. It contends that the contract provided for shipment of machinery on or about March 15, 1911. The notes upon which this action is founded bear date May 10, May 15, May 17, May 24, and July 20, of the same year. In other words, plaintiff in error executed every one of the notes at a time *after* the time it now contends that the contract should have been performed. Moreover (Transcript 25), in its pleadings and in its brief, at page 4, it fixes May 24, 1911, as the date of the arrival of the very last items of material, and one of the notes in question bear date nearly two months thereafter, namely, July 20, 1911. How could plaintiff in error have been prejudiced? A stronger admission of performance, so far at least of absence of alleged *delay* is concerned, could hardly be desired than the execution of the note some two months after the delivery of the machinery included within the alleged "*delay*." So far from being prejudicial, it would seem that it might even have been proper for the trial court to have instructed the jury that this act of plaintiff in error in the absence of a showing of fraud or collusion amounted to a conclusive admission that no claim could be made for damages so far as delay was concerned. If the plaintiff in error claimed that the note, or any of the notes, had been procured by fraud, deceit or otherwise,

then a different case would be presented. But where it admits the execution of the notes—alleges and proves that they were in payment of the machinery—and then admits that they were all executed after March 15, and one at least long after the last items of machinery had been delivered, it is difficult to see how plaintiff in error was prejudiced.

The pleadings in this case are to be tested by the laws of Washington, and that a verdict or judgment will not be disturbed because of an error not prejudicial is the well established law of that state, if, indeed, not of every state:

“An erroneous ruling or instruction, if without prejudice, is not sufficient cause for reversing a judgment.”

Brown Bros. vs. Forrest, 1 Wash. Terr. 202
(Caption).

“The appellant contends that the release was not pleaded, and was improperly admitted in evidence. The error, however, was without prejudice. The release was first properly admitted in evidence in cross-examination of appellant as effecting his credibility. * * * The facts were then before the court, and it was for it to determine its legal effect.”

Tindell vs. N. P. Ry. Co., 58 Wash. 120.

“The rule is that error, to be available, must

operate to the injury of the complaining party.”

Jose v. Stetson, 20 Wash. 648, at pg. 653.

“Appellant questions the correctness of an instruction given by a trial court relative to the temporary forgetfulness of an employee by reason of which he meets an injury. It is possible that the instruction complained of might be erroneous as an abstract proposition of law, or not a case where the circumstances were different from those he found. But taken together with all the other instructions given in this case, we think that it was not erroneous under the facts of the case, and not capable of prejudicing the rights of appellant.”

Hoff v. Japanese American F. & F. Co., 48 Wash. 580, at pg. 583.

What we have said concerning the admission of the testimony applies with equal force to the instruction criticised. The examination of the instruction as a whole discloses, we believe, that it was not erroneous in any respect.

Unlike cases cited by plaintiff in error, this action was not founded upon a contract, but upon promissory notes. Defendant in error, therefore, has sufficient pleadings to support its verdict. For the reason, then, that even under the contract or contracts, proven, defendant in error had a right to the admission of the testimony; for the reason that plaintiff in error had opened up the subject and put in evidence, and that defendant in error had a right, or at least it was within the dis-

cretion of the court to permit rebuttal testimony; and for the reason that in any event plaintiff in error was in no manner prejudiced by the alleged error, we submit that the judgment should be affirmed.

McCARTHY & EDGE,

Attorneys for Defendant in Error.

Spokane, Washington.

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PLAINTIFF IN ERROR'S REPLY BRIEF.

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*On Writ of Error to the United States District Court,
Eastern District of Washington, Northern Division.*

PLAINTIFF IN ERROR'S REPLY BRIEF.

Defendant in error states, page three of the Answer Brief, that delivery was to be made April 1, 1911, "subject to causes beyond its control." Using this as a premise it then contends that the contract itself was notice to the purchaser that the seller reserved the right to show "that delivery could not have been made on account of a cause or causes beyond its control" just the same as if it had been pleaded, but cites no authority in support of this contention.

The defendant in error then states that the rule is that such causes may be shown under a general denial

—of what it makes no mention. In support of this position the following cases are cited:

Lund vs. St. P. M. & M. Ry. Co., 31 Wash. 286, 290; 71 Pac. 1032;

City vs. Cowgill, 8 Wash. 686; 36 Pac. 1093;

Peterson vs. Seattle Traction Co., 23 Wash. 615, 34; 63 Pac. 539.

The Lund case is one in which a shop keeper sued the railroad company for obstructing the street in front of his place of business for an unreasonable length of time. There is no liability in such case except for negligence—unnecessary delay in the work. The plaintiff alleged negligence; the defendant answered denying generally. The defendant introduced testimony showing that the delay was occasioned by circumstances beyond its control. The court held that it was admissable to show that it was not negligent. Obviously the case is not in point. That it was not negligent, was due to the fact that the delay was not unreasonable, which was in turn due to the fact that it could not get materials, although it had used every effort to do so. The proof was in support of the issues.

In the Cowgill case action was brought on a bond. The defendant denied execution. The facts were that defendant and two others had executed a bond and that afterward, without the defendant's knowledge, the name of one of the other parties to the bond was erased and the name of one Evans substituted. In fact the bond sued upon was not the one executed by Cowgill.

The case is sound, but is not contrary to the cases plaintiff in error cited in its Opening Brief. The court said:

"It was incumbent upon appellant to show that the respondent had executed and delivered the particular bond upon which suit was brought. On the other hand, it was the privilege of the respondent to show, under the form of denial made in the answer, any fact which tended to disprove the ultimate conclusion that they had executed and delivered the particular bond offered in evidence.

"The admission of the evidence mentioned was therefore proper, it tended to show. . . . that they had neither executed nor delivered the bond upon which Evans' name was found as surety." (688-689.)

It is certainly admissable to show under a general denial that the contract alleged is not the one which was made by the defendant. But plaintiff below averred that it had performed the contract (it did not deny execution) which defendant below alleged was not performed. The only proof plaintiff was entitled to make was by showing the performance of the *particular contract* set up by defendant. Instead of introducing proof of performance it introduced proof showing non-performance, directly contrary to its allegation, and then attempted to set up an excuse. In the Cowgill case the proof supported the allegation; in the case at bar the proof does not support the allegation. If in the Cowgill case the plaintiff had set up the bond Cowgill actually executed and on the trial had attempted to prove his case by proof of the altered bond, the court would certainly have refused to have admitted it in evi-

dence. Under such a state of facts the case would have had a bearing.

Defendant in Error cites no authority to the effect that an alteration may be shown under an allegation of performance for the very reason that no such case exists.

In the Cowgill case the court cites in support of its decision, *Cape Ann National Bank vs. Burns*, 129 Mass. 596, a raised note case. The court there allowed proof under a general denial that the note had been altered. That case is sound and is still the law in Massachusetts. However, in Massachusetts, proof of a modification or waiver of a contract cannot be shown under an avement of performance. See *Allen vs. Burns* (Mass.) 87 N. E. 194 and 195, cited on page 7 of Plaintiff in Error's Opening Brief. The same is true in the Washington courts.

An "altered" instrument is very different from a "modified" one, in law. In the former a material change in the instrument is made without the consent of the party executing it, while in the latter there is a change in the contract made by or with the consent of the parties to it. A modification or waiver is made by agreement; an alteration is made contrary to the agreement.

In the Peterson case it is simply held that where action is brought on one contract, a different contract may be shown in support of the defendant's denial that he entered into the contract alleged. It is certainly proof supporting the denial. The case has no bearing. If the defendant answered alleging performance and then had attempted to prove a different contract, an entirely

different question would have been presented to and decided by the court. That question would have been analogous to the one herein and a conclusion would no doubt have been reached in line with Plaintiff in Error's contention and with an unbroken line of authorities.

There is no Washington case squarely in point. In one, *Buddress vs. Shafer*, 12 Wash. 310; 41 Pac. 423, a rule having some bearing is announced, namely, that under a mere denial of the value of service, it can not be shown that the services were not rendered.

More nearly in point is *Kennedy vs. School District*, 20 Wash. 399, 401; 55 Pac. 567, in which it was held that a recision could not be proven under a denial of employment, in an action for the breach of contract of employment.

The evidence clearly was not proper under the pleadings.

Defendant in Error's second contention is that the evidence was proper in rebuttal.

"Bouvier says, that rebutting evidence is that evidence which is given by a party in a case to counteract or disprove facts, which have been given in evidence by the other party." 7 Words & Phrases, 5987.

In other words it is evidence in denial of some affirmative fact which the answering party is endeavoring to prove.

Plaintiff in Error was endeavoring to prove the allegation made in its answer, namely, that the contract was not performed by Defendant in Error. The only

proof that could be offered in rebuttal was that the contract was performed, which Defendant in Error had alleged was the fact. Testimony tending to prove a modification or waiver of performance was not proper in rebuttal since it did not counteract or disprove that which Plaintiff in Error was endeavoring to prove, non-performance. Modification and waiver go hand in hand with non-performance. Testimony tending to prove either, cannot have the slightest tendency to counteract or disprove non-performance.

A brief review of the pleadings and evidence as shown by the transcript will show clearly that Plaintiff in Error kept its proof within the limits made by its pleadings. That being true, Defendant in Error, was also limited to proof admissible under its pleadings.

Plaintiff in Error alleged in its answer:

1. That prior to Sept. 15, 1910, it entered into negotiations with Defendant in Error for the furnishing to Plaintiff in Error of all the machinery complete for a single band mill (Transcript 10).

2. That on Sept. 15, 1910, they had not been able to work out the details in full or to agree upon all the terms, and it was agreed orally between them that when the details were worked out and when a complete understanding had been reached, a formal written contract would be prepared and executed by them. That for the purpose of evidencing such portions as had already been agreed upon a memorandum in writing should be signed by them, and pursuant thereto a preliminary memoran-

dum or contract was entered into as shown by Exhibit A attached to the answer (Transcript 11 and 22).

3. That about Nov. 4, 1910, the final agreement was entered into for the furnishing of the machinery complete within a reasonable time, not later than March 15, 1911, and that there should be included in the machinery furnished, should Plaintiff in Error desire, and delivered within the same time, one or two extra boilers with fittings (Transcript 12).

4. That the final agreement was oral, except as shown by the preliminary agreement and certain general specifications (Transcript 23-24) and except as shown by certain letters (Transcript 12-13).

5. That thereafter, on or about Dec. 1, 1910, Defendant in Error orally contracted with Plaintiff in Error to furnish one extra boiler and change the installation of boilers from a battery of two to a battery of three. That Defendant in Error agreed to furnish and install the boilers within a reasonable time and not later than March 15, 1911 (Transcript 13).

6. That a reasonable time for Defendant in Error to have fully performed its contract would have been not to exceed three months (Transcript 13).

Evidence was introduced by Plaintiff in Error showing the above allegations to be specifically true (Transcript 59-64). In order to show what was a reasonable time the witness, Brown, was asked questions by Plaintiff in Error and answered as follows:

“Q. Mr. Brown, I will ask you this question: What

would be a reasonable time for furnishing an extra boiler, together with the breeching that goes with the boiler, so as to change the installation of the boiler from a two battery to a three battery, the boiler being seventy two inches by eight feet?

"A. Do you mean the boiler was on the ground?

"Q. No, the construction of it so as to be ready to deliver?

"A. Construction of the boiler. Do you mean the construction of the boiler proper?

"Q. Yes.

"A. Well, two months ought to be a reasonable time." (Transcript 64 and 65.)

After Plaintiff in Error had rested Defendant in Error called as a witness J. W. Hubbard, and in the course of his testimony the following occurred:

"Q. All right, Mr. Hubbard, you may state what caused the delay in the shipment of the machinery mentioned in the contract of November 12th.

"MR. WILLIAMS, Attorney for defendant: Just one moment. I want to interpose an objection as incompetent, irrelevant and immaterial, not an issue in the case. There is no attempt here in the pleadings to formulate any excuse or show anything except a general denial that they did fail to furnish the machinery within the time specified.

"MR. McCARTHY: If the delay is not an issue in the case, if Mr. Williams is willing to concede that—

"MR. WILLIAMS: Your excuse, I am referring to. I am not referring to what you did. We have alleged they failed to furnish the machinery in the time stipulated. They have denied that. That is all there is in issue, as I can see it, under the pleadings as drawn.

"THE COURT: I will hear from you on that question.

"MR. McCARTHY: In other words, Mr. Williams says it is admitted that the delay took place and it is up to us to show a reason or excuse.

"THE COURT: No, his objection is that you cannot show an excuse without pleading it.

"MR. McCARTHY: Without pleading it?

"THE COURT: That is the objection he urges at this time.

"MR. McCARTHY: I can show a contract, any contract different from the one he has pleaded, and every portion of it.

"THE COURT: Yes.

"THE COURT: Wait until I read the reply. I think I will admit the testimony in rebuttal of testimony you have offered, regardless of the pleadings.

"MR. WILLIAMS: Allow us an exception; and may this objection go to all of this character of testimony without renewing the objection.

"THE COURT: Yes.

(Question read).

"A. Well, at the time this order was drawn up it specified two boilers. After it was drawn up Mr. Phelps asked us—said he that he would use—decided afterwards that he would use three boilers instead of two and asked us to get a proposition from the Muskegon Boiler Works on three boilers instead of two, increasing it one-half. We immediately started to get this and we got the boiler proposition about 30 days from the Muskegon Boiler Works, and sent it to Mr. Phelps. He accepted it some time later, as shown in the correspondence. I don't remember how much later. And the contract says also that the drawings were to be made subject to Mr. Phelps' approval. They changed the boiler room entirely. It increased the steel casing, which was a special steel casing made around this boiler, and added another boiler to the equipment; and as soon as we got this boiler proposition we asked Mr. Phelps to check it over." (Transcript 65-67).

Plaintiff in Error was bound by its pleadings to show what was a reasonable time for the Defendant in Error

to furnish the extra boiler. Its evidence went no further than that. The only evidence proper in rebuttal would have been such as would show that the time stated by the witness was not reasonable. The offer to show excuses or waiver, should have been refused as not proper for any purpose.

Discussions of the authorities cited to Defendant in Error on this proposition would serve no purpose. They clearly have no bearing.

The Defendant in Error's third contention is that if the evidence was not proper the admission of it was not reversible error because not prejudicial.

The Defendant in Error gives as its first reason for this proposition that there was a provision in the contract which made the acceptance of the machinery a waiver or damages for delay and therefore Plaintiff in Error was not entitled to damages for delay in any event.

The conclusion does not follow. The question whether or not the Plaintiff in Error was entitled to damages for delay was in issue in the District Court and the question of delay went to the jury. The Defendant in Error is bound by the theory on which the case was tried in the court below. The effect of that provision cannot be determined on this appeal. Issues are tried in the Trial Court. The Appellate Court simply reviews assigned errors which it is claimed occurred at the trial. Only that part of the record which may be of importance in reviewing assigned errors is before the

Appellate Court and therefore this Court is not in a position to determine the effect of that provision.

The second reason advanced in support of the contention that the error was not prejudicial, is that the Plaintiff in Error was not surprised or hampered in the presentation of its case because of the production of that evidence. That argument does not merit a reply. The Plaintiff in Error was not bound to expect that Defendant in Error would not confine its proof to the issues made by the pleadings. It had the right to demand that the proof be so limited. Whether or not Plaintiff in Error was surprised has no bearing on the question of prejudice.

The argument relating to the effect of some of the notes having been executed after the delivery of the machinery might have been properly addressed to the jury if a question of waiver of damages had been before it for determination but it has no bearing on a question of prejudice.

The jury was instructed that it could take into consideration the cause or causes of delay in determining whether or not the Plaintiff in Error was damaged by reason of Defendant in Error's failure to perform the contract—"If you find that there was a delay caused by the failure of the plaintiff to perform its contract and that such delay has not been acquiesced in by the defendant, it will be entitled to recover damages occasioned by such delay." Under the pleadings Plaintiff in Error was entitled to damages upon proof that Defendant in Error failed to perform its contract. De-

fendant in Error's witnesses conceded that there was a failure to perform. Plaintiff in Error thereupon became entitled to all damages proved. The jury was given the right under that instruction to allow no damages at all if there was a delay which the jury considered was acquiesced in by Plaintiff in Error.

While the Court admitted evidence on an issue foreign to the pleadings, in the instruction criticized it went further and submitted the case on a theory, neither made an issue in the pleadings nor on which there had been any evidence offered, namely, acquiescence of Plaintiff in Error.

The instruction was further erroneous because if there had been any issue of an excuse for non-performance or an issue of acquiescence in the non-performance then such issues should have been submitted to the jury under proper instructions. The Court did not attempt to define the law applicable to excuses for non-performance nor acquiescence in non-performance, but left the jury to determine such issues (if there were any issues of that character) blindly without direction. The Court in effect told the jury to consider the excuses offered by the Defendant in Error and to consider whether the Plaintiff in Error had acquiesced, and return such verdict as they felt was proper. What constituted an excuse which would relieve Defendant in Error from liability for failure to perform and what would constitute acquiescence in non-performance was not stated.

Plaintiff in Error respectfully submits that the Honorable District Court's ruling was erroneous and preju-

dicial and the judgment should be reversed and a new trial ordered.

DANSON, WILLIAMS & DANSON,

Attorneys for Plaintiff in Error.

Spokane, Washington.

IN THE
United States Circuit Court of Appeals
for the Ninth Circuit

M. A. PHELPS LUMBER COM-
PANY, a corporation,

Plaintiff in Error,

vs.

No. 2168.

McDONOUGH MANUFACTURING
COMPANY, a corporation,

Defendant in Error.

*On Writ of Error to the United States District Court for
the Eastern District of Washington, Northern
Division.*

PLAINTIFF IN ERROR'S PETITION FOR
RE-HEARING.

DANSON, WILLIAMS & DANSON,

Attorneys for Plaintiff in Error,

Spokane, Washington.

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*On Writ of Error to the United States District Court for
the Eastern District of Washington, Northern
Division.*

PLAINTIFF IN ERROR'S PETITION FOR
RE-HEARING.

Plaintiff in Error respectfully petitions the court for re-hearing on the opinion filed February 3, 1913, for the reasons hereinafter set forth.

Plaintiff in Error does not believe that this court has intended to commit itself finally to the doctrine that evidence is admissible for the purpose of showing excuse for non-performance or waiver of performance, under an averment of performance or a denial of non-performance. The contrary doctrine has been uniformly held

by all other courts of last resort. The effect of the decision of this court, however, is to hold that such evidence is admissible.

It would seem from the opinion that this court has been misled as to the purpose for which the evidence was introduced. No mention is made of the question which caused the witness to make the objectionable statements, although his answer is quoted and discussed at length. The question clearly discloses the purpose:

“Q. All right, Mr. Hubbard, you may state *what caused the delay* in the shipment of the machinery mentioned in the contract of November 12th” (Record, 65).

The answer standing alone and when not considered in connection with the question does not disclose its vice. The question discloses that the evidence was introduced for the purpose of showing an excuse for failure to perform the contract, or, in other words, for failure to deliver the machinery within the agreed time. Or, as to the extra boiler, to deliver same within a reasonable time. An important situation which developed on the trial of this case and which has not been noted by this court, is the fact that as to all of the machinery, with the exception of one boiler, the contract was in writing and the time of shipment was definitely fixed “on or about March 15, 1911,” while it is alleged in the answer that the agreement was that it was to be shipped within a reasonable time and not later than March 15, 1911. The reason for this allegation appears from a consideration of the answer. It was the contention of Plaintiff in Error that the written agreement of date Sep-

tember 15, 1910, was but preliminary to a final contract being made and that the real contract between the parties was both oral and in writing and that Plaintiff in Error was not bound by the said document of September 15, 1910, as to the date of delivery and the machinery to be furnished. Notwithstanding that this is the theory on which the case was tried in the lower court, this court proceeds as though such contract was final and conclusive. As to the extra boiler, if we assume that it was not embraced in the contract as finally consummated about November 12, 1910, then the time for delivery of such extra boiler was within a reasonable time. It was by reason of this third boiler that it became necessary that evidence should be introduced as to what was a reasonable time for the furnishing of same.

It is to be borne in mind that Plaintiff in Error alleged in its answer that Defendant in Error agreed to furnish the machinery within a reasonable time after November 12, 1911, and not later than March 15, 1911, and that such reasonable time was not to exceed three months (Record, 13). Defendant in Error simply denied this allegation (Record, 41). At the trial Plaintiff in Error introduced evidence showing what was a reasonable time for performance and that the contract was not performed within that time (Record, 60-65). As suggested before, this course was made necessary by the fact that there was an uncertainty as to whether the third boiler was included in the contract as finally made. If not, then Plaintiff in Error was driven to the necessity of showing that such third boiler was not furnished.

within a reasonable time. The writer of the opinion seems to recognize the fact that Plaintiff in Error's evidence was so limited and says:

"In view of that testimony it was proper to show *in rebuttal* that the *delay was caused* by the defendant
* * *"

In other words, this court holds that evidence in support of an allegation of non-performance or a denial of performance may be avoided (not rebutted) by evidence showing an excuse for failure to perform. This evidence of excuse relates largely to the difficulties Defendant in Error encountered in performing its contract and largely to the failure of people with whom it contracted to furnish the boilers, something for which Plaintiff in Error was in no respect responsible.

Plaintiff in Error cited many cases in its opening brief in which it is held that evidence of excuse or waiver is not admissible under a denial of non-performance. Neither the Defendant in Error nor the court has criticized these decisions, nor cited a case to the contrary.

No mention is made in the opinion of the instruction given by the lower court and on which error was assigned, which instruction permitted the jury to consider excuse for non-performance—"You have a right to consider the cause or causes of delay." If we should assume that evidence showing excuse for non-performance was admissible by reason of the fact that Plaintiff in Error had introduced evidence showing failure to deliver within a reasonable time, it could only apply to the boiler. As to the rest of the machinery the time

for the shipment was fixed definitely "on or about March 15, 1911." As to the boiler alone could it be said that Defendant in Error had a reasonable time within which to ship same. Notwithstanding this, in the instruction criticized, the lower court did not limit "the cause or causes of delay" to the boiler, but has applied the same to the entire amount of machinery furnished, therefore disregarding the contract fixing the time of shipment for on or about March 15, 1911; and notwithstanding there was no issue made in the pleadings of waiver of performance or excuse for non-performance, the jury were told to determine the case as they saw fit. This instruction permitted them to say that Defendant in Error should be relieved from its contract and plaintiff should be compelled to bear the loss occasioned by the violation thereof, because, forsooth, Defendant in Error had been unfortunate; that it had been overoptimistic as to the time within which it could perform; it had not anticipated shop troubles probably that arose; it had not anticipated violation of the contracts it made with others for certain of the machinery, particularly boilers, and the loss, therefore, should fall on Plaintiff in Error and not on Defendant in Error.

This court says further in the opinion: "The testimony was admissible also as tending to show that there was no delay." Such was not the theory on which it was offered nor on which it was admitted, as is evidenced by the question submitted to the witness and the statement of the lower court explaining its admission, and also by the fact that the Defendant in Error made no

claim that it was offered for that purpose. We assume that this court, in the portion of the opinion just quoted, is referring to the fact that the furnishing of the third boiler might have delayed Defendant in Error in the performance of its contract, or that the fact that Defendant in Error may have had shop troubles or had troubles with people with whom it contracted for materials, and particularly the boilers, extended its time for the performance of the contract with Plaintiff in Error, but if these are the theories of the court, clearly they are untenable. Where two people have made a contract, the fact that they should thereafter make another contract would not release the parties from the original contract made. So here, assuming that the third boiler was extra, it would not change their previous contractual relationship, nor would it release either from the obligations of the original contract. The contract for the extras would be separate and independent. Nor would Plaintiff in Error be responsible for shop troubles of Defendant in Error or difficulties it might experience in obtaining materials.

In the opinion it is said:

“And irrespective of the question whether or not the evidence was admissible under the pleadings, it is very clear that if there was error in its admission it was harmless. The contract contained the following: ‘The unloading of the machinery when received shall constitute a waiver of any claim for damage from delay.’ It is not disputed that when the machinery was unloaded it was accepted and installed by the defendant. Again the promissory notes which are sued upon were signed by the defendant on May 15, May 17, May 24, July 20, all in 1911, from two to three months after the date at

which the machinery was to be delivered * * *. The defendant was not prejudiced by the ruling of the court."

Here again this court has assumed a state of facts which were controverted in the lower court and on which there has been no error assigned in this court. It was denied in the pleadings that the agreement of September 15, 1910, from which this court makes the above quotation, was the final contract of the parties. It was there claimed that that was but preliminary and this is practically conceded by Defendant in Error. Notwithstanding this, this court now assumes that Plaintiff in Error was bound by everything contained in this preliminary agreement, even though under the pleadings and evidence Plaintiff in Error refused to permit the machinery to be manufactured until after the minds of the parties had more definitely met, which it is alleged was about November 12, 1910. There was no ruling of the lower court on which error was assigned on the writ of error, but this court nevertheless now reverses the lower court on rulings in favor of Plaintiff in Error and without the evidence on which such rulings were made being brought before it. Only that part of the record of importance in reviewing the errors assigned was brought to this court on the writ of error.

The admission of evidence of which complaint is made and the giving of the objectionable instruction was decidedly prejudicial to Plaintiff in Error. Even though the jury found that the contract was not performed within the agreed time and that Plaintiff in Error had

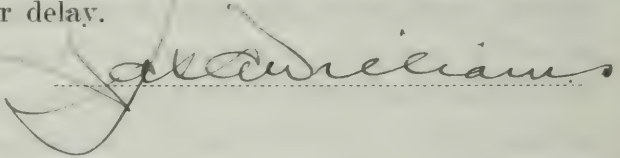
suffered loss as a result of non-performance, it was not bound to allow damages in view of the instruction allowing it to take into consideration the excuses for non-performance. The presumption is that Plaintiff in Error was not prepared to meet matter not admissible under the pleadings and it should not be held that its admission did not operate as a surprise.

We respectfully submit that Plaintiff in Error should be granted a re-hearing.

DANSON, WILLIAMS & DANSON,

Attorneys for Plaintiff in Error,
Spokane, Washington.

It is hereby certified by Jas. A. Williams, a member of the firm of Danson, Williams & Danson, counsel for Plaintiff in Error, that in his judgment the foregoing petition for re-hearing is well founded; that it is not interposed for delay.

A handwritten signature in cursive script, reading "Jas. A. Williams", is written over a horizontal dotted line. A large, sweeping flourish extends from the bottom of the signature, curving back towards the left.

No. 2180

United States
Circuit Court of Appeals
For the Ninth Circuit.

THE UNITED STATES OF AMERICA,

Appellant,

vs.

N. C. BERNARD, JOHN W. BOGAN, ALBINUS E.
BOGAN and RAMON HAUMADA,

Appellees.

Transcript of Record.

Upon Appeal from the United States District Court for the
District of Arizona.

FILED
OCT - 4 1912

United States
Circuit Court of Appeals
For the Ninth Circuit.

THE UNITED STATES OF AMERICA,
Appellant,
vs.
N. C. BERNARD, JOHN W. BOGAN, ALBINUS E.
BOGAN and RAMON HAUMADA,
Appellees.

Transcript of Record.

Upon Appeal from the United States District Court for the
District of Arizona.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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*In the District Court of the First Judicial District of
the Territory of Arizona.*

Having and Exercising the Same Jurisdiction in All
Cases Arising Under the Constitution and Laws
of the United States as is Vested in the Circuit
and District Courts of the United States.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

N. C. BERNARD, JOHN W. BOGAN, ALBINUS
E. BOGAN, and RAMON HAUMADA,
Defendants.

Complaint.

Comes now the United States of America, by J.
E. Morrison, United States Attorney for the Terri-
tory of Arizona, and brings this action in behalf of
the United States of America against the defendants
above named, and alleges:

I.

That the defendants N. C. Bernard, John W. Bo-
gan, Albinus E. Bogan and Ramon Haumada are
residents of the county of Pima, Territory of Ari-
zona, and within the First Judicial District of Ari-
zona, and within the jurisdiction of this court.

II.

That at all the times herein mentioned plaintiff was
and now is the owner of the following described
lands situate and being in the county of Pima, Terri-
tory of Arizona, and within the First Judicial Dis-
trict of the Territory of Arizona, to wit: Sections

27, 28, 33, 34 and 35, township 21 south, range 10 east, Gila and Salt River base and meridian; and sections 2 and 3, township 22 south, range 10 east, Gila and Salt River base and meridian, together with any and all vegetable matter growing thereon.

III.

That on or about the 1st day of November, 1908, the said defendants unlawfully, knowingly, wilfully, recklessly, and without the consent or permission of plaintiff, and in disregard of the rights of [1*] plaintiff, did inclose with posts and barbed-wire fences eight hundred and forty (840) acres of the public lands of the United States of America, the said 840 acres of land being parts of said sections 27, 28, 33, 34, and 35, township 21 south, range 10 east, and sections 2 and 3, township 22 south, range 10 east, Gila and Salt River base and meridian, and thence forward continuously up to the time of filing this complaint, said defendants have maintained and controlled said inclosure for their own exclusive use and occupancy, having no claim or color of title, made or acquired in good faith, or any asserted right thereto by or under any claim made in good faith with a view to entry thereof at the proper land office under the general laws of the United States of America, and have caused and permitted a great number of cattle and other livestock, belonging to said defendants, to graze upon the lands embraced within said inclosure, to the actual damage of plaintiff in the sum of \$600.00.

*Page-number appearing at foot of page of original certified Record.

IV.

That by reason of the facts above set forth the plaintiff is entitled to recover of the defendants exemplary damages in the sum of \$500.00.

WHEREFORE, plaintiff prays judgment against said defendants:

First. That said inclosure be adjudged unlawful, and that said defendants be ordered to remove said fences within five days from the rendition of judgment herein, and in the event that said defendants fail or neglect to remove said fence in accordance with the order of the Court, that the Marshal of the Territory of Arizona be directed to destroy said fences;

Second. For the sum of \$600.00, actual damages:

Third. For the sum of \$500.00, exemplary damages:

Fourth. For the costs of this action.

J. E. MORRISON,

United States Attorney for the Territory of Arizona.

[Endorsements]: No. B-87. No. 2. The United States of America vs. N. C. Bernard, John W. Bogan, Albinus E. Bogan and Ramon Haumada. Complaint. Filed January 15, 1912, at 10:00 o'clock A. M. Allan B. Jaynes, Clerk. Filed March 5, 1912. Allan B. Jaynes, Clerk. [2]

*In the District Court of the First Judicial District of
the Territory of Arizona.*

Having and Exercising the Same Jurisdiction in All
Cases Arising Under the Constitution and Laws
of the United States as is Vested in the Circuit
and District Courts of the United States.

No. B-87.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

N. C. BERNARD, JOHN W. BOGAN, ALBINUS
E. BOGAN, and RAMON HAUMADA,
Defendants.

Summons.

Action brought in the District Court of the First
Judicial District of the Territory of Arizona, and
complaint filed in the office of the Clerk of said
Court, at Tucson, Arizona.

In the Name of the United States of America to N.
C. Bernard, John W. Bogan, Albinus E. Bogan
and Ramon Haumada, Defendants, Greeting:

You are hereby summoned and required to appear
in an action brought against you by the above-
named plaintiff in the District Court of the First
Judicial District of the Territory of Arizona, and
answer the complaint filed therein (a certified copy
of which is hereto attached) in the office of the Clerk
of said Court, at Tucson, Arizona, within twenty
days after service upon you of this Summons, if
served in this said District, or in all other cases

within thirty days thereafter, the times above mentioned being exclusive of the day of service, or judgment by default will be taken against you.

Witness my hand and the seal of said Court affixed at Tucson, Arizona, this 15th day of January, 1912.

[Seal]

ALLAN B. JAYNES,
Clerk of said District Court.

UNITED STATES MARSHAL'S RETURN.

Received this writ Jan. 16, 1912, at Tucson, Arizona, and executed the same on Jan. 16, 1912, at Tucson, Arizona, upon John W. Bogan. On Jan. 18, 1912, at Tucson, Arizona, I further executed this [3] writ by service upon Albinus E. Bogan and Ramon Haumada. On Jan. 19, 1912, at Tucson, Arizona, I further executed this writ by service upon N. C. Bernard.

Service in each of the above cases was made upon each of the defendants personally, to each of whom was handed a copy of this writ, together with a copy of the complaint filed herein.

Dated this 30th day of January, 1912.

C. A. OVERLOCK,
U. S. Marshal.
By R. C. Herald,
Deputy.

Services: 4 persons.....8.00
Double Fees.....16.00

[Endorsements]: Original. Marshal's Docket No. 298. No. B-87. No. 2. In the District Court of the First Judicial District of the Territory of Arizona. United States of America, Plaintiff, vs. N.

C. Bernard et al., Defendants. Summons. Filed Jan. 31, 1912. Allan B. Jaynes, Clerk. By James R. Dunseath, Deputy. Filed March 5, 1912. Allan B. Jaynes, Clerk. [4]

*In the District Court of the First Judicial District of
the Territory of Arizona.*

Having and Exercising the Same Jurisdiction in All
Cases Arising Under the Laws of the United
States as is Vested in the Circuit and District
Courts of the United States.

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

N. C. BERNARD, JOHN W. BOGAN, ALBINUS
E. BOGAN, and RAMON HAUMADA,
Defendants.

Stipulation [Extending Time to File Answers].

IT IS HEREBY STIPULATED between the parties to the above-entitled action, through their respective attorneys, that the defendants and each of them may have until the first day of March, A. D. 1912, in which to file their several answers to the same, and that in the meantime plaintiff will not enter default against the defendants or either of them.

WITNESS our hands this 29th day of January,
A. D. 1912.

J. E. MORRISON,

United States Attorney for Arizona.

JOHN B. WRIGHT,

Attorney for the Defendants.

[Endorsements]: No. B-87. No. 2. In the District Court of the First Judicial District of the Territory of Arizona. United States of America, Plaintiff, vs. N. C. Bernard, John W. Bogan, Albinus E. Bogan and Ramon Haumada, Defendants. Stipulation. Filed Jan. 31, 1912. Allan B. Jaynes, Clerk. By James R. Dunseath, Deputy. Filed March 5, 1912. Allan B. Jaynes, Clerk. [5]

*In the United States District Court of the Ninth
Judicial District, in and for the State of Arizona.*

(Formerly the District Court of the First Judicial
District of the Territory of Arizona.)

Having and Exercising the Same Jurisdiction in All
Cases Arising Under the Constitution and Laws
of the United States, as is Vested in the Circuit
and District Courts of the United States.

No. B-87.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

N. C. BERNARD, JOHN W. BOGAN, ALBINUS
E. BOGAN, and RAMON HAUMADA,

Defendants.

Answer.

Come now the defendants, and answering the complaint of the plaintiff, admit, deny and allege as follows, to wit:

I.

Admit each and every allegation contained in

paragraph I of plaintiff's complaint.

II.

Deny that at the time of the filing of the plaintiff's complaint, and for a long time prior thereto, or at the present time, the plaintiff was or is the owner of the following described lands, situate in the territory (now State) of Arizona, and in the county of Pima, and within the then First Judicial District of the said territory (now State) of Arizona, to wit: Sections 27, 28, 33, 34 and 35, township 21 south of range 10 east, Gila and Salt River base and meridian, and sections 2 and 3, township 22 south of range 10 east, Gila and Salt River base and meridian, together with any and all vegetable matter growing thereon, but admit that the plaintiff is the owner of a small portion of sections 34 and 33 of said township 21 south of range 10 east, and of the whole of section 2, township 22 south of range 10 east, aforesaid, together with any and all vegetable matter growing thereon. [6]

III.

Deny that on or about the 1st day of November, 1908, the said defendants, or any of them, unlawfully, knowingly, wilfully, recklessly, and without the consent or permission of plaintiff, and in disregard of the rights of plaintiff, did enclose, with posts and barbed-wire fences, eight hundred and forty (840) acres of the public lands of the United States, being parts of said sections 27, 28, 33 and 34, and 35, township 21 south of range 10 east, and sections 2 and 3, township 22 south, range 10 east, aforesaid, or that the defendants from thenceforth continuously up to the time of the filing of this complaint have main-

tained and controlled such enclosure, for their own exclusive use and occupancy. Deny that defendants have no claim or color of title to said sections made and acquired in good faith, or any asserted right thereto, by and under any claim made in good faith, with a view to entry thereof, at the proper land office, under the general laws of the United States of America, and defendants deny that they permitted or caused a great number of cattle or other livestock, belonging to them, to graze upon the lands embraced in said enclosure, and deny that the plaintiff has suffered actual damage in the sum of \$600.00, or in any other amount, and in this connection, defendants allege that said sections 27, 28 and 35, township 21 south of range 10 east, aforesaid, is not Government land belonging to the United States of America, but is land that has heretofore been appropriated, and that any posts or barbed wires or enclosures contained upon said sections 27, 28 and 35, and constructed and maintained by the defendants is not and has not been upon any lands of the Government whatsoever, and further, defendants deny that said section 3, township 22 south of range 10 east, or any portion thereof has been fenced, or in any manner enclosed by the defendants whatsoever, and allege that the same is not now enclosed or fenced by them; and, further, defendants allege that said section 2, township 22 south, range 10 east, is not land of the United States, but is a school section, belonging to the State of Arizona. Admit that at the time of [7] the institution of this suit, defendants had enclosed with posts and barbed-wire fences, a small portion of sec-

tions 33 and 34, of said township 21 south of range 10 east, but that said enclosures have been entirely removed, by the defendants, since the institution of this suit, and defendants deny, generally and specifically, that they have and maintain at this time any enclosures whatsoever upon the Government lands of the United States within any or all of the sections aforesaid.

IV.

Defendants deny that the plaintiff is entitled to recover exemplary damages in the sum of \$500.00, or any other sum whatsoever.

WHEREFORE, by virtue of the matters and things aforesaid, defendants pray that they be hence dismissed with their costs.

JOHN B. WRIGHT,
Attorney for Defendants.

State of Arizona,
County of Pima,—ss.

John W. Bogan, being first duly sworn, on his oath deposes and says: That he is one of the defendants in the above-entitled action; that he has read the foregoing answer, and knows the contents thereof; that the matters and things therein stated are true, save as to those matters therein stated on information and belief, and as to such matters, he believes it to be true.

JOHN W. BOGAN.

Subscribed and sworn to before me this 4th day of March, 1912. My commission will expire December 5, 1915.

[Seal]

LENNA H. BURGESS,
Notary Public.

[Endorsements]: No. 87-B. No. 2. In the United States District Court of the Ninth Judicial District in and for the State of Arizona. United States of America, Plaintiff, vs. Arivaca Land and Cattle Co. et al., Defendants. Answer. Filed March 5, 1912. Allan B. Jaynes, Clerk. John B. Wright, Tucson, Arizona, Attorney for Defendants. [8]

In the District Court of the United States of America, in and for the District of Arizona.

(Formerly the District Court of the First Judicial District of the Territory of Arizona.)

Having and Exercising the Same Jurisdiction in All Cases Arising Under the Constitution and Laws of the United States as is Vested in the Circuit and District Courts of the United States.

No. B-87.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

N. C. BERNARD, JOHN W. BOGAN, ALBINUS
E. BOGAN, and RAMON HAUMADA,

Defendants.

Amended Answer.

Come the defendants, and by way of amended answer to the complaint of the plaintiff heretofore filed herein admit, deny and allege as follows:

I.

Admit that the defendants, N. C. Bernard, John W. Bogan, Albinus E. Bogan and Ramon Haumada

are residents of the county of Pima, State (formerly territory) of Arizona, and within the jurisdiction of this Court.

II.

Deny that at the time of the filing of plaintiff's complaint, and for a long time prior thereto, or at the present time, the plaintiff was or is the owner of the following described lands, situate in the territory (now State) of Arizona, and within the then first judicial district of said territory (now State), to wit: Sections 27, 28, and 35, in township 21 south of range 10 east, Gila and Salt River base and meridian; and deny that the plaintiff is or at the time of the filing of the said complaint was, the owner of all of section 34, in said township and range; admit that the plaintiff is the owner of said section 33, in said township and range; admit that the plaintiff was and is now the owner of section 3, in township 22 south of range 10 [9] east, and admit that at the time of the filing of the said complaint, the plaintiff was the owner of section 2, in said last-named township and range, but deny that the plaintiff is now the owner thereof.

III.

Admit that on or about the 1st day of November, 1908, the defendants did enclose with posts and barbed-wire fences, about eight hundred and forty (840) acres of the public lands of the United States of America, the said eight hundred and forty acres of land being parts of said sections 27, 28, 33, 34 and 35, in township 21 south of range 10 east, and in sections 2 and 3, in township 22 south of range 10 east, Gila and Salt River base and meridian, but deny that the

said defendants did so enclose the same unlawfully, knowingly, wilfully, recklessly, and without the consent or permission of plaintiff, and in disregard of the rights of the plaintiff, but, on the contrary, allege that such defendants believed that they had lawful right and authority to so fence the same at the time the fences were constructed, as aforesaid; deny that the same caused actual damage to the plaintiff in the sum of Six Hundred Dollars (\$600.00), or in any other sum whatsoever.

IV.

Deny that by reason of the facts set forth in plaintiff's complaint, the plaintiff is entitled to recover from the defendants exemplary damages in the sum of Five Hundred Dollars (\$500.00), or in any other amount or sum whatsoever.

V.

Further answering the said complaint, these defendants allege as follows: That all of sections 27 and 35, in township 21 south of range 10 east, has ceased to be the lands of the Government of the United States; that each and every parcel of said two named sections has been segregated from the public domain, and has been entered in the United States Land Office at Phoenix, either under the homestead laws, by various individuals, or by reason of scrip placed thereon, and that the government has no interest whatsoever in or to either of said sections at this time; that the lands in section 28, in said [10] township and range, save and except the N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ thereof, have all ceased to be public lands of the plaintiff; that such lands have been segregated

and have been entered by various individuals under the homestead laws, or by scrip, and that the same are now being held in good faith, and that the Government has ceased to have interest therein, save and except as to said N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ thereof, and defendants allege that no fences whatsoever are contained in or upon the said N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of said section 28; that the defendants nor either of them, have any fences or enclosures whatsoever at the present time upon section 33, in said township and range; that in so far as section 34, in said township and range is concerned, these defendants allege that the NE. $\frac{1}{4}$ and the N. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ and the E. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ and the NW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$, do not belong to the plaintiff herein, but have been segregated from the public domain, and that the same belongs to either George Pusch or the Arivaca Land and Cattle Company, a corporation, and that the defendants, nor either of them, either individually or as officers of any corporation, have any fences or other enclosures whatsoever upon the said section 34, other than upon the lands so segregated, described and owned as aforesaid. Defendants further allege that in so far as section 2, township 22 south of range 10 east is concerned, that the same ceased to be the land of the plaintiff on the 14th day of February, 1912, when Arizona was admitted into the Union as a State, the same having been set aside by the Enabling Act of Congress as property of the State of Arizona, and the plaintiff has no further interest therein whatsoever; that defendants further allege, in reference to section 3, in said township 22 south of

range 10 east, that the defendants have not, nor has either of them, individually or collectively, personally or as officers of any corporation whatsoever, or in any other capacity at all, ever erected or maintained, and have not now erected nor are they, or any of them, maintaining any fences or enclosures thereon whatsoever, and that no [11] fences or other enclosures of any kind or character or description now exist upon the said section.

WHEREFORE, defendants pray that they be hence dismissed with their costs.

JOHN B. WRIGHT,
Attorney for Defendants.

State of Arizona,
County of Pima,—ss.

George Pusch, being first duly sworn, on his oath deposes and says: That he is one of the defendants in the above-entitled action; that he has read the foregoing amended answer, and knows the contents thereof; that the matters and things therein stated are true, in substance and in fact, save as to such matters therein stated on information and belief, and, as to such matters, he believes them to be true.

GEORGE PUSCH.

Subscribed and sworn to before me on this the 23d day of April, A. D. 1912.

My commission will expire March 16, 1916.

[Seal]

LENNA H. BURGESS,
Notary Public.

[Endorsements]: No. B-87. No. 2. In the District Court of the United States of America, in and for the District of Arizona. United States of Am-

ica, Plaintiff, vs. N. C. Bernard et al., Defendants.
Amended Answer. Filed Apr. 24, 1912. Allan B.
Jaynes, Clerk. By Earl S. Curtis, Deputy. John B.
Wright, Tucson, Arizona, Attorney for Defendants.
[12]

[Plaintiff's Exhibit "D."]

**PLAT OF INCLOSURE MAINTAINED BY
N. C. BERNARD ET AL.**

[Endorsements]: No. 2. United States of Am-
erica vs. N. C. Bernard et al. Plff's. Exhibit "D."
Filed May 7, 1912. Allan B. Jaynes, Clerk. By
Earl S. Curtis, Deputy. [13]

[Defendants' Exhibit No. 1.]

Hon. Fred Sutter	COCHISE COUNTY	J. E. James
Judge		Clerk.
	SUPERIOR COURT,	C. B. Wilson
		Deputy.
	STATE OF ARIZONA,	R. B. Krebs
		Deputy.
	TOMBSTONE,	

March 7th, 1912.

Hon. John B. Wright,
Tucson, Ariz.

My dear John:—

I acknowledge receipt of answer in the case of
B-86 and B-87, and note that the statement is made
under oath therein that the defendants do not now
maintain any unlawful inclosures on the public do-

main. Before taking any action looking toward a dismissal of these cases, under the practice of the office, I shall cause a re-examination of the ground to be made by a Special Agent of the General Land Office. I am also of the opinion that the defendants in these cases should pay the costs.

Very respectfully,

J. E. MORRISON,

U. S. Attorney.

[Endorsements]: No. 2. United States of America vs. N. C. Bernard et al. Defendants' Exhibit 1. Filed May 7, 1912. Allan B. Jaynes, Clerk. By Earl S. Curtis, Deputy. [14]

*In the United States District Court for the District
of Arizona.*

UNITED STATES OF AMERICA,

Plaintiff,

vs.

N. C. BERNARD, JOHN W. BOGAN, ALBINUS
E. BOGAN, and RAMON HAUMADA,

Defendants.

Assignment of Errors.

ASSIGNMENT OF ERROR 1.

The order and decree is contrary to the law, wherein it dismisses the suit, and thereby denies a judgment for damages, in favor of the plaintiff, the evidence clearly showing that the plaintiff had sustained damage in a considerable amount, and the law

being that plaintiff was entitled to judgment for such damage.

ASSIGNMENT OF ERROR 2.

The order and decree is contrary to the facts wherein it dismisses the suit, and thereby denies a judgment for damages in favor of the plaintiff, the evidence clearly showing that the plaintiff had sustained damage in a considerable amount.

J. E. MORRISON,

United States Attorney for the District of Arizona,
and Solicitor for the Plaintiff.

[Endorsements]: No. 2. In the United States District Court for the District of Arizona. United States of America, Plaintiff, vs. N. C. Bernard et al., Defendants. Assignment of Error. Filed May 28, 1912, at 9:30 A. M. Allan B. Jaynes, Clerk. [15]

*In the United States District Court for the District
of Arizona.*

UNITED STATES OF AMERICA,

Plaintiff,

vs.

N. C. BERNARD, JOHN W. BOGAN, ALBINUS
E. BOGAN, and RAMON HAUMADA,

Defendants.

Order of Dismissal of Suit.

This cause came on for final hearing and was argued by counsel, and the Court, upon due consideration of the pleadings and the evidence, and the arguments of counsel, doth now

ORDER, ADJUDGE AND DECREE that this suit be and the same is hereby dismissed at defendants' costs, taxed in the sum of One Hundred Fifteen 05/100 Dollars.

Dated May 8th, 1912.

JULIAN W. MACK,
Judge.

[Endorsements]: No. 2. In the United States District Court for the District of Arizona. United States of America, Plaintiff, vs. N. C. Bernard et al., Defendants. Order of Dismissal of Suit. Filed May, 28, 1912, at 10 A. M. Allan B. Jaynes, Clerk.
[16]

*In the United States District Court for the District
of Arizona.*

UNITED STATES OF AMERICA,
Plaintiff,

vs.

N. C. BERNARD, JOHN W. BOGAN, ALBINUS
E. BOGAN, and RAMON HAUMADA,
Defendants.

Petition on Appeal.

To the Honorable JULIAN W. MACK, Circuit Judge, Presiding in the District Court of the District of Arizona:

The above-named complainant in the above-entitled cause, United States of America, considering itself aggrieved by the order and decree made and entered by the above-named court in the above-entitled cause, under date of May 8, 1912, wherein

and whereby, among other things, it was ordered, adjudged and decreed that the said suit be dismissed, does hereby appeal to the United States Circuit Court for the Ninth Circuit from said order and decree, and particularly from that part thereof which directs that said suit be dismissed, for the reasons set forth in the assignment of errors which is filed herewith; and it prays that this its petition for its said appeal may be allowed and that a transcript of the record, proceedings and papers upon which said order was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

Dated May 28, 1912.

J. E. MORRISON,
United States Attorney for the District of Arizona,
and Solicitor for the Complainant.

ORDER.

The foregoing petition on appeal is granted and the claim of appeal therein is allowed.

Done in open court this May 28th, 1912.

JULIAN W. MACK,
United States Circuit Judge, Presiding. [17]

[Endorsements]: No. 2. In the United States District Court for the District of Arizona. United States of America, Plaintiff, vs. N. C. Bernard et al., Defendants. Petition on Appeal. Filed May 28, 1912, at 10 A. M. Allan B. Jaynes, Clerk. [18]

*In the United States District Court for the District
of Arizona.*

No. 2.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

N. C. BERNARD, JOHN W. BOGAN, ALBINUS
E. BOGAN, and RAMON HAUMADA,

Defendants.

BE IT REMEMBERED, that heretofore and on,
to wit, the 22d day of April, A. D. 1912, the same be-
ing one of the regular juridical days of the April
Term, A. D. 1912, of the above-entitled court, the fol-
lowing order was made and entered of record in said
court in the above-entitled cause, which said order
is in words and figures as follows, to wit:

UNITED STATES OF AMERICA,

Plaintiff,

2.

vs.

N. C. BERNARD et al.,

Defendants.

It is ordered that this case be set for trial on Tues-
day, May 7, 1912, at 9:30 o'clock A. M.

And afterwards and upon, to wit, the 7th day of
May, A. D. 1912, the same being one of the regular
juridical days of the April Term, A. D. 1912, of said
Court, the following order was made and entered of
record in said court in the above-entitled cause,

which said order is in words and figures as follows, to wit:

UNITED STATES OF AMERICA

2.

vs.

N. C. BERNARD, JOHN W. BOGAN, ALBINUS
E. BOGAN and RAMON HAUMADA,
Defendants.

This case came on this day regularly for trial before the [19] Court, sitting without a jury, a trial by jury having been in open court expressly waived by the respective parties hereto, J. E. Morrison, Esquire, United States Attorney and O. T. Richey, Esquire, Assistant United States Attorney appearing on behalf of the United States, and John B. Wright, Esquire, on behalf of the defendants, and both parties announce ready for trial. The plaintiff then, to maintain upon its part the issues herein introduced certain documentary evidence and also called as witnesses the following named persons, to wit: Arnold Mandle, Arthur H. Noon, George Hayworth, Burton S. Green, Robert J. Selkirk, Geo. N. Sayre, N. C. Bernard and J. E. Morrison, who were duly sworn, examined and cross-examined, and this being the usual hour of recess, it is ordered that the further trial of this case be continued until Wednesday, May 8, 1912, at 9:30 o'clock A. M. On motion of J. E. Morrison, Esquire, it is ordered that the plaintiff be granted leave to withdraw Plaintiff's Exhibits "A," "B" and "C" upon filing certified copies thereof.

And afterwards and upon, to wit, the 8th day of May, A. D. 1912, the same being one of the regular

UNITED STATES OF AMERICA

2. vs.
N. C. BERNARD, JOHN W. BOGAN, ALBINUS
E. BOGAN and RAMON HAUMADA,
Defendants.

This case having been continued from May 7, 1912, come now the same parties hereto, and the further trial of the case proceeds as follows: The plaintiff, to further maintain upon its part the issues herein, recalled as witnesses R. J. Selkirk, and Geo. N. Sayre, who were further examined and cross-examined, and thereupon the plaintiff rested its case. Counsel for the defendant then moved the Court to dismiss this action. Argument of the respective counsel was had, [20] and the matter being fully submitted to the Court and the Court being fully advised in the premises, does grant said motion and orders that judgment be entered herein, dismissing this action at the cost of the defendants.

And afterwards and upon, to wit, the 28th day of May, A. D. 1912, the same being one of the regular juridical days of the April Term, A. D. 1912, of said Court, the following order was made and entered of record in said court in the above-entitled cause, which said order is in words and figures as follows, to wit:

UNITED STATES OF AMERICA

2.

vs.

N. C. BERNARD et al.,

Defendants.

It is ordered that the prayer of the complainant for an appeal to the United States Circuit Court of Appeals for the Ninth Circuit be and the same is hereby granted. [21]

[Certificate of Clerk U. S. District Court.]

United States of America,

District of Arizona,—ss.

I, Allan B. Jaynes, Clerk of the United States District Court for the District of Arizona, do hereby certify the above and foregoing to be a true, perfect, correct and complete transcript and copy of the original Complaint with the endorsements thereon; Summons, showing the return of the officer serving the same, together with the endorsements thereon; Stipulation, with the endorsements thereon; Answer, with the endorsements thereon; Amended Answer, with the endorsements thereon; Designation of Plaintiff's Exhibit "D," with the endorsements thereon; Defendants' Exhibit 1, with the endorsements thereon; Assignments of Error, with the endorsements thereon; Order of Dismissal of Suit, with the endorsements thereon; Petition on Appeal, with the endorsements thereon; together with a true, perfect, correct and complete transcript and copy of all the minute entries made and entered of record in this said court in that

certain cause lately pending in said court wherein the United States of America was plaintiff, and N. C. Bernard, John W. Bogan, Albinus E. Bogan, and Ramon Haumada were defendants, as the same remain now on file and of record in my office.

I hereby further certify that there is transmitted herewith a true, perfect, correct and complete transcript and copy of the original transcript of the oral testimony taken on the trial of the above-entitled cause.

WITNESS my hand and the seal of said Court, affixed at Phoenix, in said District, this 31st day of August, A. D. 1912.

[Seal]

ALLAN B. JAYNES,

Clerk.

By Earl S. Curtis,

Deputy Clerk. [22]

*In the District Court of the United States for the
District of Arizona.*

No. 2.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

N. C. BERNARD et al.,

Defendants.

Reporter's Transcript of Testimony.

Tried at Phoenix, Arizona, May 7th and 8th, 1912,
before the Court, the Honorable JULIAN W.
MACK, Judge, presiding.

J. E. MORRISON, United States Attorney, and
O. T. RICHEY, Assistant United States
Attorney, for the United States.

JOHN B. WRIGHT, Esq., for the Defendants.
O. E. SCHUPP, Reporter.

By Mr. WRIGHT.—By permission of the counsel
for plaintiff, and with the consent of the Court, the
defendant is permitted to demur specially to plain-
tiff's complaint, and to have the same entered in the
record by the stenographer and to be considered a
part of the defendants' amended answer herein, said
demurrer being as follows:

Defendants demur specially to the complaint of
the plaintiff and show that the allegations concern-
ing damages, actual and exemplary, as set forth in
plaintiff's complaint, do not allege facts sufficient
to constitute a cause of action for such damages
against the defendants;

That said complaint improperly joins a suit for a statutory equitable relief by way of injunction with the common-law suit for damages in trespass;

That no facts are alleged in said complaint sufficient to constitute a cause of action for damages, actual or exemplary, in trespass, and that the statute under which said action is brought does not provide for the allowance of any damages of whatsoever character therein.

(Extended argument.) [1*]

[Testimony of Arnold Mandl, for the Government.]

ARNOLD MANDL, called as a witness in behalf of the United States, and duly sworn, testifies as follows:

Direct Examination.

(By Mr. MORRISON.)

Q. What is your name? A. Arnold Mandl.

Q. What official position, if any, do you occupy?

A. Clerk in the U. S. Land Office.

Q. Phoenix? A. Phoenix, Arizona.

Q. I hand you book and ask you to state what that is.

A. This is the record of entries in the U. S. Land Office.

Q. What do you call that book? A. Tract-book.

Q. I will ask you if that contains the records of all entries that are of record in the local land office, in townships 21 and 22 south, range 10 east?

A. Yes, sir.

Mr. MORRISON.—Now, we offer that portion of the pages of the book that show the entries in those two townships.

(Testimony of Arnold Mandl.)

Mr. WRIGHT.—I will ask you to be a little more specific?

By the COURT.—Is it the whole book?

Mr. MORRISON.—No, a portion of the book.

Mr. WRIGHT.—For the benefit of the Court and our benefit we would like for them to show what they do contain.

The COURT.—I understood the witness to say that that covered all the entries in these two sections—

Mr. MORRISON.—Two townships.

The COURT.—That is certain sections in those two townships.

Mr. MORRISON.—Yes. [2]

The COURT.—And you are introducing the records in those two sections.

Mr. MORRISON.—Generally, in the two townships.

The COURT.—For the purpose of showing no entries on the lands you describe?

Mr. MORRISON.—Yes; portions of them. Of course, they have made scrip entries, some of them—

Mr. WRIGHT.—Before that book, or any of those entries are admitted in evidence, there is a question I would like to ask the witness about that book.

Q. Is it not true that that book was made up in the city of Washington and sent out here?

A. Parts of it possibly may have been made up in Washington.

Q. Don't you know it was?

A. No, I don't; I know that the entries for those

(Testimony of Arnold Mandl.)

two townships, 21 and 22 south, and all the ranges east have been made in our office as they have come in.

Q. That book right up to date? A. Yes, sir.

Q. It shows all the entries right up to date?

A. Yes, sir.

Q. If that book did come from Washington, since it got here all new entries since it came from Washington entered in that book here? A. Yes, sir.

Q. And that is right up to date?

A. Yes; I believe, though, that the transcripts were made into this book from the old tract-book.

[3]

(Mr. MORRISON.)

Q. It is all checked up right to date?

A. Yes, sir.

Q. It shows the state of the land in those two townships, whether entries on the land have been made or not? A. Yes, sir.

Q. Whether made through the local land office?

A. Yes, sir.

Mr. MORRISON.—We offer those portions of the book here—I will specify the portions: Beginning with section 26, in township 21 south, range 10 east, that will include then, 27, that is it will end the other side of 27.

Mr. WRIGHT.—If the Court please, the complaint don't say anything about section 26.

Mr. MORRISON.—27, if it will suit the Judge. The pages are not numbered, your Honor, but each page shows a section. We offer the portions of the

(Testimony of Arnold Mandl.)

book which show the entries made in sections 27, 28, 33, 34, 35, township 21 south, range 10 east, and sections 2 and 3, in township 22 south, range 10 east, of the Gila and Salt River base and meridian.

Q. I hand you book marked 22 S. and 21 S. and ask you to state if those are the original records of the local land office of the United States at Phoenix?

A. Yes, sir.

Q. Do they contain the original plats in the original records of the local United States land office, Phoenix, of townships 21 and 22 south, range 10 east of the Gila and Salt River base and meridian?

A. Yes, sir. [4]

Mr. MORRISON.—Now, we offer those two plats.
(Mr. WRIGHT.)

Q. Those two plats are up to date? A. Yes, sir.

Mr. MORRISON.—We will ask to later substitute copies so as to return the original files.

The COURT.—Very well.

(Mr. MORRISON.)

Q. Now, the tract-book and the two plats of which you have testified show the exact condition to this date of the public lands included in all those two townships, do they not?

A. Yes, sir; with the exception I think there may be entries suspended for some cause or other.

Q. Entries suspended? A. Yes, sir.

Q. Would they be noted on the plat?

A. Noted on the plat, but not the cause.

Q. It would show there—the cause wouldn't be there, of course, but the fact of suspended entry

(Testimony of Arnold Mandl.)

shows on the tract-book? A. Yes, sir.

Q. Would it show on the plat? A. No, sir.

Q. Then, the tract-book and the plats taken together show the exact condition as to whether entries of any kind have been made or offered and suspended? A. Yes, sir; form a complete record.

Q. Form a complete record of these two townships? A. Yes, sir.

Q. Complete record? [5] A. Yes, sir.

Mr. MORRISON.—We renew our offer now.

Cross-examination.

(By Mr. WRIGHT.)

Q. Now, referring to this book that you say is up to date, with reference to section 35, township 21 south, range 10 east, you mean to tell me that that is up to date on that page? A. Presumably it is.

Q. Presumably it is, but is it?

A. It may be—an inaccuracy may be there, but it would show on the plat, that together with the plat show a complete record.

Q. Isn't it a fact that the north half of the south half of said section 35 has been taken up as a desert entry by one A. E. Bogan?

A. I can't tell without an examination of the records.

Q. Which records?

A. The tract-book and plat.

Q. Will you examine these records and see? (Witness looks at records.) Please tell me if that shows anyone has filed upon the southwest quarter and south half of the southeast quarter of section

(Testimony of Arnold Mandl.)

35, township 21 south, range 10 east? A. Yes, sir.

Q. Who has? A. Albinus E. Bogan.

Q. How do you ascertain that from this page that was introduced in evidence?

A. This contains the entry of all the land, this contains notation of all land in 35 with reference to township 22 south, 10 east. [6]

Q. Then, in order to get the entire thing in evidence we would have to introduce more than this one page? A. Yes, sir.

Mr. MORRISON.—We introduced all the records with reference to both of these townships.

Mr. WRIGHT.—Then, the southwest quarter and the south half of the southeast quarter of section 35 has been taken up by desert entry of one Albinus E. Bogan, as shown by your books there?

A. Yes, sir.

Q. Now, what does that book show in reference to the balance of the east half of said section 35?

A. It shows that about all of it has been taken—the northeast quarter and the northeast of northwest quarter and west—

Q. Read it again and read slowly.

A. It shows that the remainder of the section has been taken.

Q. Of the entire section? A. Yes, sir.

Q. In what way?

A. The northwest quarter of the northwest quarter is embraced in Soldiers' Additional Homestead Entry 010265 by George Push, made April 30, 1910.

Q. April 30, 1910?

(Testimony of Arnold Mandl.)

A. The southeast quarter of the northwest quarter is embraced in Soldiers' Additional Homestead 010266 also by George Push, April 30, 1910; and the southwest quarter of the northwest quarter is embraced in Soldiers' Additional Homestead Entry 010267, made the same date, by George Push; the northeast quarter [7] and the northeast of the northwest quarter, and the west half of the southeast quarter are embraced in Lieu Selection 014183, made April 14, 1911, by the Santa Fe Pacific Railroad Company.

Q. Does it include the entire section?

A. Yes, sir; it does.

(Mr. MORRISON.)

Q. That is, with the Bogan desert entry?

A. Yes, sir.

Q. What is the date of the Bogan desert entry?

A. February 2, 1907.

(Mr. WRIGHT.)

Q. 1907? A. Yes, sir.

(Mr. MORRISON.)

Q. Desert land entry? A. Yes, sir.

(Mr. WRIGHT.)

Q. Let me ask you, Mr. Witness, is it not a fact that prior to the 15th day of January, 1912, each and every part and parcel of said section 35 had been taken up in one way and another? A. Yes, sir.

Q. And had been segregated from the public domain? A. Yes, sir.

(Mr. MORRISON.)

Q. How about the northeast quarter of the south-

(Testimony of Arnold Mandl.)

east quarter of section 35, is there a conflict as to that, or has it ever been entered?

A. There is a correction noted; it says—the original entry [8] says the west half.

Q. Yes, west half; I am asking you about the northeast of the southeast, not the west half.

A. I note over the west half is a little mark in pencil “n,” which indicates the north half of the southeast was intended.

Q. North half of the southeast?

A. Yes, sir; that would include the northeast of the southeast.

Q. What becomes of your west half of the southeast, then?

A. According to the plat the northeast of the southeast is vacant; according to the original entry on the tract book, also.

Q. Northeast of the southeast is vacant?

A. Apparently.

Q. But is it? That is the point we want to know. Figure it out and tell us whether it is or not.

A. Yes, sir; it is.

Q. It is vacant? A. As far as these books show.

Q. You state the northeast quarter of the southeast quarter of section 35, containing 40 acres, is, as far as these records show, and always has been vacant public land? A. Yes, sir.

(Mr. WRIGHT.)

Q. I want to ask you if it is not true that application for that scrip was for the north half of the southeast quarter and that the land office errone-

(Testimony of Arnold Mandl.)

ously got it the west half of the southeast quarter, and in getting west half of southeast quarter they interfered with the desert entry of Bogan which [9] had already been taken up?

A. If the land office did make a mistake, which is improbable, as the same error would have been made, the same entry exists on both plat and tract-book that would have been the case; but the error is probably that of the applicant, more likely.

Q. Well, isn't there some way that your office records will show?

A. These are the records; the "n" over here seems to indicate the "n" above "w" stands for the west half, seems to indicate the clerk noted the error when posting, let it go as it is.

Q. Isn't it true that that has since been corrected in the land office, although it may not show upon that book?

Mr. MORRISON.—Object to that unless he knows of his own personal knowledge.

A. I don't know, sir.

Q. Give me the serial number.

A. Scrip 014183.

Q. Can you get the record of that? A. Yes, sir.

Mr. WRIGHT.—If the Court please, I ask that he be requested to get that record; it will show that error I am reliably informed.

Mr. MORRISON.—No objection to that.

Mr. WRIGHT.—It will show the inaccuracy of this book, if the Court please.

Mr. MORRISON.—It may show the inaccuracy

(Testimony of Arnold Mandl.)

of your application. [10]

(Mr. MORRISON.)

Q. Now, in section 35, of which we have just been speaking, how many entries were made in that section prior to the first day of November, 1908?

Mr. WRIGHT.—Object to that, if the Court please, it is immaterial. The situation is what was the condition of that land at the time this suit was brought.

Mr. MORRISON.—This is merely with reference to section 35; we will show and I yet take it that the answer admits at the time we brought this suit there was certainly some portion of it public land.

The COURT.—The answer denies; he has practically admitted there was some, but his answer denies it.

Mr. MORRISON.—Here is the proposition, if your Honor please: It has not yet been determined that we are entitled to recover damages, then I have the right to show these entries were not made, or I can show the date of these entries, to show how long they were public lands and in the enclosure, that is the reason I asked this question.

The COURT.—You want to show how long he did inclose these lands?

Mr. MORRISON.—Yes. (Argument.)

Mr. MORRISON.—Read the last question.

REPORTER reads: "Now, in section 35, of which we have just been speaking, how many entries were made in that section prior to the first day of November, 1908?"

(Testimony of Arnold Mandl.)

Mr. WRIGHT.—Objected to as immaterial.

The COURT.—You may get the evidence in, and we will consider [11] the objections afterwards.

A. Does that mean how many entries at present existing?

Q. Do these records show how many entries had been made prior to the first of November, 1908?

A. Of the entries at present intact the only one is Albinus E. Bogan.

Q. What did that contain?

A. That contained the southwest quarter and the south half of the southeast quarter of section 35.

Q. Now, just one more question, then the balance of the section, excluding the Bogan entry, being the southwest quarter and the south half of the southeast quarter was not covered by any entry of any kind prior to November 1, 1908?

A. The northwest quarter of the northwest quarter was embraced in Entry No. 72, Serial 04534, made February 2, 1907, relinquished April 30, 1910.

Q. Who filed that? A. Noah W. Bernard.

Q. And who filed upon that particular land that was in that desert land entry upon this relinquishment being filed? A. George W. Push.

Q. By what entry?

A. Soldiers' Additional Homestead Entry.

Q. On the whole of it?

A. Northwest quarter of the northwest quarter, only 40 acres.

(Mr. WRIGHT.)

Q. Now, in reference to section 27, will you please

(Testimony of Arnold Mandl.)

examine those books and see if there is any part or parcel of section [12] 27 which is not segregated from the public domain at this time?

Mr. MORRISON.—With reference to section 27, while for a short time some was enclosed some years ago, we make no contention with reference to that section. That may go in the record with my consent.

Mr. WRIGHT.—The elimination of 35 with the exception of 40 acres?

Mr. MORRISON.—No, we are going to ask for damages for all the time you had it after November 1, 1908.

Mr. WRIGHT.—You cease your contention about section 27?

Mr. MORRISON.—Yes; that is I stated we made no contention with reference to 27.

Mr. WRIGHT.—Now, about section 28, will you please look that up?

Mr. MORRISON.—28 we contend there was land and we will ask the witness—will you kindly give us the status?

A. The north half of the northeast quarter and the north half of the northwest quarter are vacant.

Q. Are vacant? A. Yes, sir.

Q. Are there any entries appearing in section 28?

A. Yes, sir.

Q. You may state what they are.

A. The south half of the northeast quarter—

Q. Whose filing?

A. And the northeast of the southeast quarter
Noah Curry Bernard.

(Testimony of Arnold Mandl.)

Q. What is the description of that?

A. South half of the northeast quarter and the northeast [13] quarter of the southeast quarter.

Q. Northeast of the southeast? A. Yes, sir.

Q. Now, then, that is homestead entry is it, give the number? A. Homestead No. 010256.

Q. And what is the date?

A. April 30, 1910.

Q. Now, as to the rest of the section what are the other entries?

Q. Northeast quarter of southwest quarter embraced in Soldiers' Additional Homestead Entry 010261, made April 30, 1910, by George Push.

Q. Go ahead.

A. The southeast quarter of the northwest quarter and the northwest quarter of the southeast quarter are embraced in Soldiers' Additional Entry 010264, made April 30, 1910, by George Push.

Q. Yes, proceed.

A. Southwest quarter of the northwest quarter is embraced in Homestead Entry 010760, made May 26, 1910.

Q. By whom?

A. By Joseph H. Ball; it embraced also the north half of the northeast quarter and the southeast quarter of the northeast quarter of section 29, township 21 south, 10 east.

Q. Now, what other entries in section 28?

A. Northwest quarter of southwest quarter.

Q. Northwest quarter of southwest quarter?

A. Yes, sir.

(Testimony of Arnold Mandl.)

Q. Go ahead. [14]

A. Is embraced in Homestead Entry 010837, made June 7, 1910, by Leonardo Lopez.

Q. And now then in section 28—

A. The south half of the southeast quarter and the south half of the southwest quarter are embraced in Lieu Selection 014183, made April 4, 1911, by the Santa Fe Pacific Railroad Co.

Q. Any other entries in section 28?

A. No, sir.

Q. Now, on November the 1st, 1908, were there any entries showing of record on these plats or this tract-book?

Mr. WRIGHT.—Without renewing our objection cannot we consider it as made each time?

The COURT.—Yes, sir.

(Mr. MORRISON.)

Q. On November 1, 1908, were there any entries of record of any parts of said section 28?

A. No, sir.

(Mr. WRIGHT.)

Q. Were any of the entries you have spoken of in section 28 made subsequent to January 15, 1912?

A. No, sir.

Q. Now, you say that according to that book the north half of the northwest quarter is open land, Government land?

A. The northwest quarter of the northwest quarter; yes, sir.

Q. No, the north half of the northwest quarter of section 28? A. Yes, sir.

(Testimony of Arnold Mandl.)

Q. That is open? A. Yes, sir.

Q. Was an entry ever made on that land? [15]

A. Yes, sir.

Q. Who by? A. By Yndelacio Aguirre.

Q. When was that entry made?

A. June 21, 1911.

Q. What became of it?

A. It was cancelled by the General Land Office on March 5, 1912, as to the north half of the northwest quarter, that is the land embraced in this section.

Q. Why?

A. It doesn't appear here, but perhaps, probably on account of erroneous allowance.

Q. Was it embraced in a townsite?

A. Maybe; I don't know without seeing the letter.

Q. Will you make a note of these things so you can look them up? A. Yes, sir.

Mr. MORRISON.—That is outside the enclosure Mr. Wright.

Mr. WRIGHT.—The record show they do not claim any enclosure north of the north half of section 28?

Mr. MORRISON.—That is correct.

(Mr. WRIGHT.)

Q. And the balance of section 28 was all segregated and ceased to be Government land prior to January 15, 1912?

A. North half of the northeast wasn't.

Q. I say except that?

A. Excepting north half of the northeast—

Q. That's right? [16] A. Yes, sir.

(Testimony of Arnold Mandl.)

(Mr. MORRISON.)

Q. How was it segregated?

A. As I just said by homestead entry.

Q. By these various entries? A. Yes, sir.

(Mr. WRIGHT.)

Q. Now, in reference to section 34?

Mr. MORRISON.—Wait a minute—take up 33.

(Mr. WRIGHT.)

Q. All right, with reference to section 33.

(Mr. MORRISON.)

Q. Turn to the records showing the status of the land in section 33 and state what, if any, entries appear on that section.

A. Northwest quarter of section 33 embraced in Homestead Entry No. 014815, made June 30, 1911, by Juan Acuna; the rest of that section is vacant.

Q. Is vacant? A. Yes, sir.

Q. Ever been any other entries in that section other than the one which you have just mentioned?

A. No, sir.

Q. Give the entries in section 34?

A. North half of the southeast quarter, southeast quarter of the northeast quarter, east half of the northwest quarter and the northwest quarter of the northwest quarter are embraced in Lieu Selection 014183, made April 14, 1911, by the Santa [17] Fe Pacific Railroad Company.

Q. Now, any other entries?

A. The north half of the northeast, and the southeast quarter of the northeast quarter are embraced in Soldiers' Additional Homestead 016505 made

(Testimony of Arnold Mandl.)

January 22, 1912, by George Push.

Q. January when? A. January 22.

Q. 1912? A. Yes, sir.

Q. That entry then is later than January 15, 1912?

A. Yes, sir.

Q. Were there any other entries appearing in that section? A. No, sir.

Q. Have there ever been any other entries appearing in that section?

A. No, sir; except a desert land entry No. 72, Serial No. 04534, which was made February 2, 1907, and relinquished April 30, 1910.

Q. What ground was that for?

A. That is for the north half of the northeast quarter, and the southeast quarter of the northeast quarter, that is the same land embraced in Soldiers' Additional Homestead Entry 016505.

Q. Who filed the old desert entry?

A. Noah W. Bernard.

Q. He relinquished what date?

A. April 30, 1910.

Q. Filed upon by George Push what date?

A. January 22, 1912. [18]

Q. Anything else there?

A. There also appears to have been another entry for the same land, that is Soldiers' Additional Homestead Entry 010260, made April 30, 1910; that is the same date that the desert land entry was relinquished by George Push.

Q. What became of the desert land entry, the homestead entry?

(Testimony of Arnold Mandl.)

A. The Soldiers' Homestead Entry was rejected by the General Land Office October 9, 1911.

Q. Are there any other entries, or were there ever any other entries made in section 34? A. No, sir.
(Mr. WRIGHT.)

Q. Referring again to the north half of the north-east, and the southeast of the northeast of section 34, did I understand that was filed on as a homestead first? A. No, sir; as desert.

Q. In 1910? A. That is in 1907.

Q. 1907; now, thereafter, in 1910, it was relinquished and on the same date this scrip was put on?

A. Yes, sir; by George Push.

Q. Thereafter that scrip was rejected and new scrip was put on, am I right? A. Yes, sir.

Q. Then, prior to January 15, 1912, it was segregated was it not by reason of this desert entry on it and these scrip locations on it? A. Yes, sir.

(Mr. MORRISON.) [19]

Q. All the time?

A. There seems to be—no, it wasn't; from October 9, 1911, to January 22, 1912, it wasn't segregated.

Q. During that time was it public vacant land?

A. During that time it was public vacant land.

(Mr. WRIGHT.)

Q. During that time wasn't an appeal pending from that order dismissing the scrip?

A. It appears that an appeal had been filed.

(Mr. MORRISON.)

Q. Now, with reference to section 2, in township

(Testimony of Arnold Mandl.)

22 south of range 10 east, kindly refer to those records?

Mr. WRIGHT.—Now, if your Honor please, I object to any evidence whatsoever in reference to 2 said township, for the reason that on the 14th day of February, 1912, that section became the property of the State of Arizona and that the Government lost all interest, and that as to that this suit should be dismissed.

The COURT.—Go on and make your proof on it.

Mr. WRIGHT.—I want to amend the objection that at the date of the enabling act it became segregated from the Government land.

Mr. MORRISON.—June 20, 1910?

Mr. WRIGHT.—The date of the enabling act; I don't remember when that was.

Mr. MORRISON.—Your Honor direct us to put the proof in.

The COURT.—Yes, sir.

(Mr. MORRISON.)

Q. In reference to section 2, township 22 south, range 10 [20] east, state what if any entries appear of record or ever did appear of record?

A. Lot one, that is northeast of the northeast quarter—

Q. What entry was that?

A. Embraced in desert entry 71 serial 04533, made February 2, 1907, by Albumus E. Bogan.

Q. Any others in section 2?

A. There was one homestead entry 015190, made August 17, 1911, by Walter William Bailey, for lots

(Testimony of Arnold Mandl.)

2, 3 and 4, and the southeast quarter of the northwest quarter, which, however, was rejected and later withdrawn.

Q. What would lots 2, 3 and 4 have been if they were not fraction?

A. That would be the northwest quarter of the northeast quarter and the north half of the northwest quarter.

Q. Any other entries in section 2? A. No, sir.

Q. Now, what became of that homestead entry that was rejected? A. Later withdrawn.

Q. Later withdrawn? A. Yes, sir.

Q. By whom? A. By the applicant.

Q. When was it rejected?

A. It was rejected the same day it was filed.

Q. What day was it filed?

A. Suspended when it was filed, presumably for some evidence, and then rejected; the rejection dates back to the date of entry. [21]

Q. What is the date of the entry?

A. August 17, 1911.

Q. Any other entries at all? A. No, sir.

Q. Ever have been any entries there?

A. No, sir.

Q. Now, refer to section 3, were there ever any entries made by anybody in section 3? A. No, sir.

Q. Are there any at this time? A. No, sir.

Q. That is section 3, township 22 south, range 10 east? A. Yes, sir.

[Testimony of Arthur H. Noon, for the Government.]

ARTHUR H. NOON, called as a witness on behalf of the United States, and duly sworn, testified as follows:

Direct Examination.

(By Mr. MORRISON.)

Q. Mr. Noon, where do you live? A. Arivaca.

Q. How long have you been living at Arivaca?

A. Since November 16, 1910.

Q. You know Mr. George Push? A. Yes, sir.

Q. And do you know Mr. N. C. Bernard?

A. Yes, sir.

Q. John W. Bogan? A. Yes, sir.

Q. Albumas Bogan? A. Yes, sir. [22]

Q. You know Ramon Ahumada? A. Yes, sir.

Q. How long have you known these gentlemen?

A. For a good many years.

Q. Did you know them about the 1st of November, 1908? A. 1908?

Q. Yes, sir. A. Yes, sir.

Q. Did you meet a man about that date named Quinn? A. Yes, sir.

Q. What was his full name?

A. I think it is D. L., I am not sure, D. L. Quinn.

Q. E. N., isn't it? A. D. L.

Q. Did he represent himself to you to be a special agent of the general land office? A. Yes, sir.

Q. State what, if anything, you did in company with Mr. Quinn on or about the first day of November, 1908, with reference to riding a fence or enclosure in townships 21 and 22 south, range 10 east.

(Testimony of Arthur H. Noon.)

A. Mr. Quinn came to my house and he had a letter from the clerk of the Forest Service office to me asking me to show Mr. Quinn over the country, that he was a stranger in the country, and was a special agent from the land office.

Q. What did you do, you and Quinn?

A. I rode out with him down the Arivaca Valley over this township 21 south, range 10 east, and over these fences, these illegal fences of the Arivaca Land and Cattle Company. [23]

Q. Now, did you ride all along the fence?

A. Yes, sir.

Q. What kind of fences were those, what were they made of? A. Four barb wires.

Q. Four wires high?

A. Four wires high; yes, sir; some places there might have been three wires where the stock didn't—if I remember, I think some parts with just three wires stretched on account stock didn't bother those parts.

Q. Now, are you able to state about how much land there was enclosed within those fences at that time when you rode them with Quinn?

A. Well, I could say approximately—you know on account of fences running catcornered around the sections and not being on section lines would be impossible to give the exact number, but at that time they were ranging about 1,500 to 2,000 acres, I would judge.

Q. Altogether? A. Yes, sir.

Q. Are you familiar with those fences as they ap-

(Testimony of Arthur H. Noon.)

pear to-day? A. As they appear to-day?

Q. Yes. A. Yes, sir.

Q. Are they in the same places?

A. Not to-day; no.

Q. When was the last time you saw those fences up?

A. Well, they have been taking them down piece by piece up to it seems to me they commenced taking the fences down somewheres in January or February. [24]

Q. Of this year? A. Of this year.

Q. Now, do you—where do you live down there with reference to this large enclosure which you have spoken of? A. I live inside of this.

Q. You live inside? A. Yes, sir.

Q. Then, you are quite familiar with this enclosure? A. Yes, sir.

Q. You may state if after the time that you and Quinn rode the enclosure the fences and the enclosure remained the same for a considerable length of time? A. Yes, sir.

Q. How long?

A. They remained the same from that time up until they took them down in January or February of this year.

Q. Just the same, or were they not extended in places?

A. Well, they were extended in one place; I noticed in particular there was a Mexican farmer had a little piece of land that would fall in section 33 and in October when they were gathering up for

(Testimony of Arthur H. Noon.)

this cattle sale they repaired these fences, October, 1911, they repaired these fences and in repairing them just extended and took in this little small enclosure where the Mexican raised pumpkins, etc., make the field about 3 acres larger.

Q. You know where section 36 is down there?

A. Yes, sir.

Q. Didn't they put a fence around that after the time you and Quinn rode?

A. On 36, the school section; yes, I feel satisfied they had their fence on when Quinn was there. [25]

Q. On section 36? A. Yes, sir.

Mr. WRIGHT.—I move to strike all that evidence out about section 36; nothing in the pleadings referring to 36.

The COURT.—If it was all one enclosure they can show it; if separate enclosures they cannot; if they are only showing what this enclosure was and they allege it in due form, they can show it to include other property.

Mr. WRIGHT.—I object to it on the other ground that section 36 since the existence of the Territory was not Government land at all, school land.

The COURT.—You may show what the enclosure is.

(Mr. MORRISON.)

Q. Now, I understand your statement to be that until sometime in January of this year the enclosure which you rode with Quinn in township 21 south of range 10 east and 22 south, 10 east, was just the same, with the exception it extended in one place

(Testimony of Arthur H. Noon.)

as the time when you and Quinn rode it?

A. I forget whether it was—what year they made a lane down through it to give the cattle a show to go to the water, on account cattle was suffering for water, I think that was in 1910, they cut those—built their fences with a lane down to the main wash, or what you might call it, or river, where the water was, give these cattle a show to go to water instead of forcing them to walk about four miles around to get water.

Q. Aside from that, I mean.

A. If I understand your question you were asking if any changes made?

Q. Yes. [26]

A. That change made to allow these cattle to get that water, if I remember right, that was in 1910; that would be a difference from when me and Quinn rode it in 1908.

Q. Aside from that change and their taking in the little piece of land the Mexican had?

A. Just the same.

Q. Just exactly the same? A. Yes, sir.

Q. Do you know what the numbers of your home-stead entry are, the survey numbers?

A. Yes, sir.

Q. Can you find it there in that plat? (Witness examines plat.) A. Yes, sir.

Q. Now, beginning with—which is your entry, now, describe it in numbers.

A. The west half of the west half of section 27; that would be this. (Indicating on plat.)

Q. West half of the west half?

(Testimony of Arthur H. Noon.)

A. That would be this. (Indicating.)

Q. Now, then, does any part, and did any part at the times mentioned of, that fence run across your land?

Mr. WRIGHT.—If the Court please, I object to that.

The COURT.—He is just trying to get the location in his head; he may answer.

A. No; it never ran across this land; it run away further south, you know; I am in one of the north sides of this big large enclosure.

Q. I know; I mean the portion of the north enclosure, any [27] part of the fence.

A. It certainly did.

Q. Part of the north fence of the enclosure?

A. It ran across the northwest quarter of the northwest quarter.

Q. Of what section? A. Section 27.

Q. Now, then, will you examine this plat and see and state, if you can, whether—take a look at this plat—that red line running across the northwest quarter of the northwest quarter of section 27 is substantially or exactly in the place where the fence actually runs across the land?

Mr. WRIGHT.—I will ask him not to ask these questions in a leading way. Let the witness locate the fence.

The COURT.—This is only trying to refresh his recollection.

A. Yes, sir; it is when I went over the fence with D. L. Quinn, special agent.

(Testimony of Arthur H. Noon.)

Q. Where is that portion of the fence now?

A. That fence has been removed.

Q. And when was it removed?

A. That was removed in 1910.

Q. Now, then, where did you and Quinn start to ride this fence from, if you can show us on this map?

A. We started to ride the fence from here, went to the southeast corner of section 35, hunted up that section.

Q. That section corner?

A. And if my memory serves me right Mr. Quinn took that as the first starting point.

Q. Where did you go from there? [28]

A. Then, he run a line out to the fence.

Q. South?

A. South; and then he followed the fence with his compass tallying the posts and at every corner, each corner, he would take another bearing with his compass, and run these fences all around as on this plat; I recognize these section corners.

Q. You went with him? A. I rode with him.

Q. You observed him making these surveys?

A. I observed him making these compass surveys.

Q. Now, you may state whether the red lines on that plat represent the enclosure just as it was when you and Quinn rode it? A. Yes, sir.

Q. What kind of land is enclosed in that fence, what kind of land is it?

A. It is pasture land, good pasture land, covered with a good growth of grama-grass.

(Testimony of Arthur H. Noon.)

Q. What kind of land, what class of land?

A. Well, parts of this land bottom land fenced, kind of agricultural land, then rolling mesas, what would call grass lands, pasture land.

Q. Anything suitable for plowing up?

A. Bottoms are suitable but not the hills.

Q. Do you know in section 33—take section 33—look at section 33—do you know where section 33 is?

A. Yes, sir.

Q. State what the east half of section 33, what kind of land that is? [29]

A. East half of section 33; part of that is agricultural land and part rocky, what they call ridge land, got rocks, soil and grass on it.

Q. Lots of grass there?

A. Yes; when stock is kept off it grows up very rapidly.

Q. Now, do you know where section 34 is on the ground there? A. Yes, sir.

Q. How about the southern portion—

A. The southern—

Q. The southern and middle portion of section 34?

A. That is rolling, ridges, the southern part of it, of 34, and ravines, what we call ravines or draws.

Q. How about the grass?

A. Very plentiful when stock is kept off from it.

Q. What effect did this fence have with reference to stock?

A. It had the effect to raise a good crop of grass for the cattle that were put in the pastures.

Q. Whose cattle were put in there?

(Testimony of Arthur H. Noon.)

A. Company's cattle, or people selling cattle through the company.

Q. What company?

A. The Arivaca Land and Cattle Company, and neighbors around there had cattle to sell, and the company sold a great many cattle in that country for the neighbors and charge their commission and pasturage for them and ship them for them.

Q. Do you know anything about the value of the pasture per acre down there in that country?

A. Well, yes, I have some idea; this bottom land, pasture like that they usually charge if put an animal in for a short [30] time 50 cents a month.

Q. Fifty cents a month?

A. Yes, for a short time.

Q. In your judgment are the lands in this enclosure worth 50 cents a month for cows and horses per head? A. No.

Q. Wouldn't say so for all of that. How about the lands in the east half of section 33?

A. Well, that is ridge land; that is not bottom land; that couldn't be classed as the best land.

Q. What would be the reasonable value of it as pasturage per acre per head?

A. If you kept them in there a year—do you mean by the annual rate?

Q. No, by the month.

Mr. WRIGHT.—Object to that; he has not qualified to testify.

The COURT.—He may answer.

A. Now, in regard to that question; for instance,

(Testimony of Arthur H. Noon.)

if a man owned that land and a man came along with a bunch of cattle and wanted to pasture and leave them in there for a year—

Q. Answer it on that basis first.

Mr. WRIGHT.—Object to his answering it on that basis.

A. It depends on how long he wants to leave those cattle in there.

The COURT.—Answer it on that basis, that is for a year.

A. I don't believe I can answer; I tell you why, I haven't had that experience pasturing cattle by the year, so I wouldn't be able to answer that question.

[31]

Q. Can you qualify in any way to give us an idea what the value of that ground for pasture purposes is for any length of time?

A. I think in renting land like that, to rent it by the year, about 25 cents an acre.

Q. Twenty-five cents an acre for pasturage?

A. Yes, sir.

Q. Now, you say you know the Bogans—any water down in this enclosure?

A. Yes, sir; in the enclosure; yes, sir.

Q. Where, what part of the enclosure, generally?

A. Generally, the water is in, most of the water is in section 27 and section 28.

Q. What, if anything, do you know about cattle that belong to people other than the company, or to the Bernards or Bogan, or George Push, were those cattle allowed to go into this enclosure?

(Testimony of Arthur H. Noon.)

A. They put a gate at what they call the Ike Hidario—call it the watering canal—in years when the grass was getting scarce in that neighborhood they would close that gate and just allow their own cattle to water, but usually in years when plenty of feed in the country the gates have always been left open, only on an emergency they would close those gates to save their own cattle, and outside cattle would have to be driven away.

Q. Who appeared to be the persons other than the company who controlled that fence, if you know anything about that?

A. I don't know of any others.

Q. The people connected with the company? [32]

A. I know I don't.

Q. How about N. C. Bernard, John W. Bogan, Albumas E. Bogan, they appear to be the ones handling that enclosure down there?

A. The foreman of the Arivaca Land and Cattle Company does all the bossing.

Q. Ramon Ahuamada?

A. Taking down and building fences, putting them up.

Q. Do you know who he is working for?

A. Yes, sir; I understand Arivaca Land and Cattle Company, one of the stockholders in the company.

Q. Do you know whether that is equally true of N. C. Bernard?

A. I understand he is a stockholder.

Mr. WRIGHT.—I object to that, if the Court please.

(Testimony of Arthur H. Noon.)

A. Because I read in the paper where they incorporated and giving the names of the incorporators; I read the papers so I understand by that.

The COURT.—That is good evidence for his understanding, but not for the Court.

Q. The gate to which you refer, which you say was kept open during the good years, you mean the years good for water?

A. During the years when feed was plentiful.

Q. Did that gate and the surroundings there permit the cattle to enter so they could pasture as well as water?

A. No; that is for the outside cattle to come and get water.

Q. Just to get water?

A. The enclosure enclosed all the water, and all cattle coming to water had to go through this gate, so any time they wished they could place a man and prevent cattle from getting water. [33]

Q. After the outside cattle got in and got to the water could they then proceed to pasture?

A. No, sir; division fences to keep them back.

Q. So they didn't get into the pasture at all?

A. No, sir; just got into the water and go back.

Cross-examination.

(By Mr. WRIGHT.)

Q. Now, was that fence that you speak of that you went around with Quinn in 1908 a continuous fence clear around? A. When with Quinn?

Q. Yes? A. Continuous fence.

Q. Any openings in it at all?

(Testimony of Arthur H. Noon.)

A. Gates at different roads for convenience of the company to get in and out.

Q. Were those gates kept shut? A. Yes, sir.

Q. Isn't it a fact that your cattle were always in that pasture? A. No, sir.

Q. Were they ever in there?

A. Yes, sir; I sold cattle years ago through Mr. Bernard and put them in there and paid a pasture fee years ago before they incorporated.

Q. Now, wasn't anybody else's cattle roaming in that pasture and out of that pasture practically all the time? A. No, sir.

Q. You are sure of that?

A. No, sir; not roaming in and out. [34]

Q. They could have roamed in and out?

A. No, sir.

Q. You tell me you never put your cattle in there?

A. When I was going to sell steers years ago.

Q. Any other time? A. No.

Q. And you say that fence remained just that way up to January, 1912?

A. I have said in 1910, I think it is 1910, they changed the fence, making a lane in the middle of the pasture, I think it falls in sections, down through 34 here somewheres, down to the water, thus giving their cattle a show to get water instead of making long walks around these fences.

Q. Didn't it give everybody else's cattle a show to get water? A. Yes, sir.

Q. Did that lane go clear through the field?

A. Yes, sir; they had a division fence; they had it

(Testimony of Arthur H. Noon.)

fixed so that the cattle could come in from either side but only get to water, but couldn't cross that way for quite awhile until the fence got broke down, crossed for awhile; later on they put two fences there with a lane so that they could change stock from the upper field to the lower field, and that is the way it is to-day, or was; that small lane is there to-day.

Q. Now, what was the condition of those fences on January 15, 1912, Mr. Noon? A. January?

Q. 15th, 1912?

A. In January, 1912, there was when they started to take them down up there, tearing them down, building them up, and [35] taking them down the second time; I can't understand what they are doing there.

Q. Have you been over that land lately?

A. Yes, live right close there.

Q. Mr. Noon, your homestead was inside of this fence, was it? A. Yes, sir.

Q. Were you prevented from going onto your homestead? A. No.

Q. You had free ingress and egress to your homestead? A. Yes, sir.

Q. You could take your horses and cattle in there and back? A. Yes, sir.

Q. Now, you testified that the east half of section 33 was agricultural bottom land?

A. Part of the east half, parts of it I testified if I remember right.

Q. How much of the east half of section 33 is agri-

(Testimony of Arthur H. Noon.)

cultural bottom land?

A. How much, how many acres?

Q. Yes.

A. Well, I wouldn't know that; you know the valley is narrow on that side that comes down and I couldn't give an estimate as to the amount.

Q. Couldn't give an estimate at all as to amount?

A. No.

Q. Do you know what the United States Forestry Department charge for pasture land in the Forest Reserves? A. Yes, sir.

Q. What do they charge? [36]

A. They charge from 4 to 9 cents for the high, the mountain lands up in the mountains.

Q. That don't mean from 4 to 9 cents each head?

A. No, an acre.

Q. That means 4 to 9 cents an acre?

(By the COURT.)

Q. Per year?

A. Yes, sir; that is the rough mountains, up in the mountains.

(Mr. WRIGHT.)

Q. This class of land you are speaking of?

A. No, not this class.

Q. What do they charge for this class?

A. Well, we have no lands on our forest down here of that class.

Q. Now, the first time you went over this area was it in 1907 with Quinn? A. 1908.

Q. Wasn't the fence changed any in 1908?

A. In 1908?

(Testimony of Arthur H. Noon.)

Q. Yes? A. No, not to my knowledge.

Q. Not to your knowledge, but you don't know for sure? A. Not to my knowledge in 1908.

Q. Were they changed in 1909?

A. I don't think so; in 1910 this lane was made.

Q. But irrespective of the lane were there any changes in the fence?

A. No, not much, except that small area I spoke about, I think it falls in section 33, that was included that fall in [37] October, 1911, that difference of a few acres.

Q. Was there any change made in the south boundary of that fence, about section 2, township 22, during those years? A. No, no change made.

Q. In section 2? A. What township?

Q. Section 2 and 3 in township 22?

A. No; there had been no change.

Q. You are sure of that? A. When?

Q. Any time between 1908 when you saw it to 1912?

A. No, there had been no changes made in section 2, as I understand you, in township 22 south, range 10 east, that fence remained the same.

Q. Now, when was the last time you have been over those fences?

A. Well, I haven't really been over them all since; but where I live I am so situated, riding out from my home daily, I see the fences most every day, can't help but see them.

Q. Where are the fences now?

A. The fences are down now.

Q. They are all down now, are they?

(Testimony of Arthur H. Noon.)

A. The old fences that Quinn rode when I accompanied him are down and there has been parts of fences put up since on some of the ground, and the wire has been taken down off of them again, and the other day just before I was subpoenaed to come in here I noticed digging more post holes different section lines.

Q. When were the fences taken down? [38]

A. Started to take them down some time in January or February, somewhere along there, piece at a time, 1912.

Mr. RICHEY.—Yo

Q. You stated in answer to Mr. Wright's question that your cattle went in and out there; did any of your cattle ever go in there except what you paid pasture on? A. No.

Q. What did they charge you for pasture?

Mr. WRIGHT.—Object to that.

The COURT.—He may answer.

Q. What did they charge you for pasture?

A. This was during cattle sales, we put our cattle in there, selling them through this company and usually their commissions ranged all the way from 25 cents to \$2 on the cattle that we put in, including pasture and expenses and commission say would be 50 cents, that is the way the bills would be made out; no way of getting at just what the pasture would be, pasture, commission and expenses so much per head.

Q. You spoke about water there, cattle from the outside getting in to the water in answer to Mr. Wright's question. Is it or is it not a fact that cattle

(Testimony of Arthur H. Noon.)

were only in there when water was plentiful and when water got scarce is when they shut the outside cattle out?

A. This watering place if feed got scarce then shut the gates, but in years when plenty of feed gates were always open to this water.

Q. To the water?

A. Yes, sir; a large watering canal; stock go in and water and go back out again; can't go into the fields at all. [39]

(Mr. MORRISON.)

Q. Can't go into this enclosure at all?

A. No, sir.

(Mr. RICHEY.)

Q. You spoke about getting in and out of your place and fence not barring, how did that happen?

A. Ramon Ahumada, the foreman of the company, needed a passway over my land and I wanted a passway back through this fence and I says to him, "I am going to put a gate out there." He says, "Go ahead and put the gate out for your convenience"; he says, "I want to put a gate across your land." I says "That will be your convenience go to it," so we accommodated one another by putting gates, so I have never been hindered in getting back and forth to my place or driving in or out my stock.

Q. In speaking of land in the forest in comparison to this have you any land in the forest as good as this land down here? A. No.

Q. By what do you fix the date of your first notice of the beginning of the removal of any of these fences?

(Testimony of Arthur H. Noon.)

A. I feel sure it was in February when they first started.

Q. By what do you recollect, from what circumstances?

A. I can recollect on account—that can be looked up in the papers—after I read in the papers the Arivaca Company was arrested—

Q. After you read in the newspaper?

A. A few days after I read that in the papers they started to take the fences down.

Q. How many days elapsed between the issue of the paper and the date that you received it at your place? [40] A. I don't catch that.

Q. How many days elapsed between the issue of the paper and the time it reached your place?

A. I would judge a couple of weeks.

Q. Two weeks from the date of the papers until it gets to your place?

A. No, I get Monday papers and get them sometimes Monday nights, sometimes the same day; we get tri-weekly mail out there, you know, and Monday's and Tuesday and Friday's papers sometimes we get them that day.

Q. And how many days after you read it in the paper was it that you first observed the removing of any of these fences?

A. I would judge all of two weeks.

Q. Two weeks? A. Yes, sir.

(Mr. WRIGHT.)

Q. This water that you speak of that they let the cattle in to water, whose land was that water on?

(Testimony of Arthur H. Noon.)

Mr. MORRISON.—Objected to as shown not to be within the enclosure.

A. In the year 1908?

Q. In the year 1908?

A. Whose land it was then?

Q. Yes?

A. I understand Noah Bernard was going to homestead that part where this water is.

Q. He was living on it?

A. Yes, sir; he was making an attempt to live out there, come out with automobile, put up a few days, go back to town; had [41] his old clothes there, I believe, his hunting clothes, anyhow.

Q. You and Push and Bernard are not friendly and haven't been for a number of years?

A. I haven't talked with Mr. Push for a number of years; the reason is in selling cattle he charged us too large a commission and we have not sold cattle through them for a good many years now, and we don't have business together.

Q. Did you stir up this trouble, make complaint against them? A. I certainly didn't.

(Mr. MORRISON.)

Q. Have you any ill-feeling toward the Bernards, or Mr. Push at all, or the Arivaca Land and Cattle Company?

A. Why, no. If you wish me to tell the story—I have been raised in Oro Blanco—

The COURT.—We do not want the history of your life.

(Testimony of Arthur H. Noon.)

(Mr. MORRISON.)

Q. Have you any ill-feeling toward these people?

A. No.

[Testimony of Arnold Mandl, for the Government
(Recalled—Cross-examination).]

ARNOLD MANDL, recalled for further cross-examination by the defendants.

(Mr. WRIGHT.)

Q. Now, in reference to that north half of the southeast quarter and the west half of the southeast quarter, you were to get the record and look up?

A. Yes, sir.

Q. What did you find?

A. The original entry was as shown on the tract-book.

(Mr. MORRISON.) [42]

Q. How was it shown on the tract-book?

A. The tract-book showed the northwest quarter and the west half of the southeast quarter; the blunder was on the part of the applicant, not of the land office.

(Mr. WRIGHT.)

Q. Now, what did Bogan's entry cover?

A. I believe I haven't—I took the tract-books back to the office.

Q. Hasn't that been corrected?

A. It was corrected much later; that is by U. S. Letter K. April 18, 1912, on the application of the applicant.

Q. On the application of the applicant?

A. Yes, sir.

(Testimony of Arnold Mandl.)

Q. They allowed them to amend that to cover that?

A. Yes, sir.

(Mr. MORRISON.)

Q. How does it stand at present?

A. At present it stands the northwest quarter and the north half of the southeast quarter of section 35.

Q. Say that again please.

A. I can give you only the status of the land in this section embraced in Lieu Selection 014643.

Q. The corrected entry, give that?

A. The northeast quarter of the northwest quarter and the north half of the southeast quarter.

Q. That fills the entire section up?

A. North half of the southeast quarter.

Q. That fills it up then? A. Yes, sir.

Q. Covers the entire section? [43]

A. Covers the entire section now.

(Mr. WRIGHT.)

Q. That was due to an error and allowed to be corrected?

A. Yes, sir; until it was corrected, the northeast quarter of the southeast quarter was vacant.

(Mr. MORRISON.)

Q. It was error on the part of the applicant?

A. Yes, sir; that was due to this, the land office accepts all entries whether in conflict with any prior entries or not.

Q. Then, as a matter of fact the northeast quarter of the southeast quarter of section 35, township 21 south, range 10 east, of the Gila and Salt River meridian remained vacant public land from Novem-

(Testimony of Arnold Mandl.)

ber the 1st, 1908, to April the 18th, 1912?

A. No, only until March 18, 1912, when the selection—

Q. March 18, 1912?

A. That time they filed, it was allowed at a later date, on March 18, 1912, they filed the application to amend and that constituted an appropriation of the land.

Q. Up to that time it remained vacant so far as your records show? A. Yes, sir.

[Testimony of George Hayworth, for the Government.]

GEORGE HAYWORTH, called as a witness on behalf of the United States, and duly sworn, testified as follows:

Direct Examination.

(By Mr. MORRISON.)

Q. What is your name?

A. George Hayworth.

Q. What official position, if any, you occupy?

A. Special Agent of the General Land Office.

[44]

Q. Did you ever have occasion as special officer to examine an enclosure situated in township 21 and 22 south, range 10 east, of the Gila and Salt River base and meridian? A. Yes, sir.

Q. Who, if anyone, accompanied you?

A. Mr. Burton R. Green, General Special Agent of the Land office, and Mr. Arthur H. Noon, I believe, was with us the greater portion of the time.

(Testimony of George Hayworth.)

Q. I hand you paper which I ask the reporter to mark Government's Exhibit "D" for identification and ask you to state if you made that plat?

A. Yes, sir.

Q. You may state what it represents.

A. This plat represents the enclosure of N. C. Bernard, George Push and others.

Q. Where?

A. Enclosing parts of sections 27, 28, 33, 34, 35, 36 of township 21 south, range 10 east, and parts of sections 2 and 3 of township 22 south, range 10 east.

Q. You made the map yourself, did you?

A. Yes, sir.

Q. You know it is correct according to the surveyed corners and marks down there?

A. Yes, sir; it is approximately correct.

Q. To what extent does your approximation extend, what did you do before you made that map, upon what is the map based?

A. This examination made by myself and Mr. Green was the second examination made of the enclosure just referred to.

Q. Second official? [45]

A. Second official examination; we had in our possession at that time a plat prepared by Mr. Quinn, the special agent who had formerly ridden it, and by means of the plat drawn by Mr. Quinn we were easily able to identify the fences, and having previously examined the land office records as to entered lands within the enclosure as mapped by Mr. Quinn, we ascertained that practically the north

(Testimony of George Hayworth.)

side of the enclosure had been subsequently covered by entries of various kinds, and while we rode around and ran the course of the entire enclosure, we did not check the north side as carefully as we did the south side.

Q. How did you check the south side?

A. South side we located the section corners and took the course of fences and stepped the distance, the change of direction of the fences, and checked them accurately to all purposes of identification, and which satisfied our minds that the fences existed at the time of our examination practically the same as that at the time of the examination made by Mr. Quinn.

Q. When in company with Mr. Noon?

A. In company with Mr. Noon, with the exception that the enclosure had been enlarged to take in a part of section 36 and practically all of section 35, and I have indicated on this map the section corners and special reference to those corners; we checked them carefully and the fences run almost, they are fairly accurate, and only by chaining them out would they be more accurate than we have drawn; but no surveyor can go over this fence and deny that the evidences are incorrect and that the area enclosed is approximately so.

Q. What part did Mr. Noon take in this matter when you and Mr. Green were down there? [46]

A. Mr. Noon took no other part than to ride with us, as I remember, along the south side of this enclosure as far as the A. E. Bogan desert entry, left

(Testimony of George Hayworth.)

us at that point and I think went to Oro Blanco.

Q. Where did you start on your ride?

A. On this enclosure?

Q. Yes?

A. We started as near as I can now recall just after we had crossed the ford of the Arivaca creek, which would be in the northeast of the southwest quarter of section 28.

Q. Mr. Noon with you at that time?

A. I cannot recall whether Mr. Noon was with us at that time or that he joined us later; we went over to Mr. Noon's house and I cannot recall positively whether at that time he was with us or not, but before we had finished the south side, after coming in 33, we rode in to Mr. Noon's house, which is in the extreme southwest corner of section 27, and we then, I remember distinctly, rode south from Mr. Noon's southwest corner, which is the southwest corner of section 27 one mile to the southwest corner of section 34, located that corner, and took the course of the fence, bearing northwesterly and northeasterly from that point, and from that point Mr. Noon accompanied us easterly I think to the southwest corner of section 36 where he left us on his way to Oro Blanco.

Q. What day was that?

A. On October 12, 1911.

Q. Does this plat also represent all of the entries that have been made within that enclosure?

Mr. WRIGHT.—Object to that as the best evi-

(Testimony of George Hayworth.)

dence has been [47] introduced, records of the land office.

The COURT.—You have introduced the best evidence of what was vacant.

(The COURT.)

Q. Does this map correctly represent the Government lands, that is the lands not entered by individuals within the enclosure as shown by the Government records? That is your question, isn't it?

Mr. MORRISON.—No.

The COURT.—Frame it as you please so as to have the matter brought out.

(Mr. MORRISON.)

Q. Does paper marked Government Exhibit "D" for identification correctly represent the public lands of the United States and the lands which have been and are now entered that are within the enclosure in question as shown by the records produced here in court?

A. At the time that this map was drawn on October 21, 1911, it shows the status of the entered lands and the location of the vacant public lands within the enclosure as on that date; and during the testimony given by Mr. Mandl, the clerk of the land office, I checked the entries as given by him, and find that this map still represents the entries made and the vacant land still existing inside the enclosure, with the exception of the northeast quarter of the southeast quarter of section 35, which is a 40-acre tract and about which Mr. Mandl has just testi-

(Testimony of George Hayworth.)

fied upon his last return to the stand to the effect that scrip applicant had incorrectly described the land desired and had recently made an amended application for the land; other [48] than that 40-acre tract this represents the entered land and vacant land as shown by the land office records at this date.

Q. Now, that 40-acre tract you speak of, the northeast of the southeast, is indicated by this plat by an isolated red square?

A. Yes, at the time this plat was drawn and the date of the institution of this suit was shown as vacant.

Q. And appears here as an isolated vacant square?

A. Yes, sir.

Q. The fence itself is the red line?

A. Yes, the red line is the fence.

Mr. MORRISON.—Now, we offer it.

Mr. WRIGHT.—If the Court please, I object to the introduction of the map to show the condition of the fence at any time subsequent to October 10, 1911. In so far as it shows conditions prior to that time we have no objection at all to the map.

Mr. MORRISON.—We concede that the objection is good as far as this witness is concerned, but the witness Noon testified to the same thing up to the time they were actually removing the fences, he said sometime in February.

The COURT.—It may go in as showing the condition at that time and if referable to the testimony may be referred to in that connection.

(Testimony of George Hayworth.)

(Mr. MORRISON.)

Q. Now, with reference to the—with the exception of that little 40 there, you may eliminate that from consideration—with reference to all of the land marked there in red appearing as Government land, Mr. Hayworth, you may state whether that is [49] public land of the United States?

A. The lands shown in red was and is public vacant land of the United States.

Q. Now, Mr. Hayworth, did you examine what kind of land that was?

A. Yes, sir; I gave some attention to the character of the land.

Q. Are you able to state what character the land is?

A. I would like to have the map, I can tell better. (Map handed to witness.) Northwesterly through this enclosure runs a narrow valley, and in sections 28 and 27 there is fine bottom land and plenty of water; the west half of the west half of section 27 is good meadow land, probably to the extent of 100 acres.

Mr. WRIGHT.—Now, if the Court please, I understood the United States Attorney practically eliminated and I object to any testimony with reference to section 27 at all.

Mr. MORRISON.—That is very true.

Q. I prefer you describe the land to which we make claim for damages.

A. Well, the vacant land appearing on this map against which there are no entries. The northeast

(Testimony of George Hayworth.)

quarter of section 33 is rolling mesa land, or rather hills and is good grazing land, and my recollection is that the southeast quarter of section 33 is about one-half hilly grazing land and the rest is agricultural land that borders along a wash that comes in on the south side of the enclosure. The vacant land in the west half of section 34 is what I would call hilly grazing land; likewise the vacant land shown in red in the southeast quarter of section [50] 34. The vacant land within this enclosure in section 3, township 22 south, range 10 east, as shown on this map is hilly grazing land; and the land in section 2, of township 22 south, of range 10 east, is greater part of it fairly level and good agricultural land, as well as good grazing land.

Q. Now, with reference to sections other than 27, that is except those you have already named?

A. The south half of section 35 is within the scope of this small valley that I mentioned, is covered by the desert entry of A. E. Bogan, is fairly level land and suitable for agricultural purposes.

Q. How about the north half of 35?

A. The northeast of 35 is rolling hills, grazing land, and the northwest of 35, I think, is about half rolling hills, grazing land, and the rest is agricultural land, as well as grazing land.

Q. How about the northeast of 34?

A. The northeast of 34 that is good agricultural land.

Q. And the north half of the southeast of 34?

A. That is, I believe that part of that gets into

(Testimony of George Hayworth.)

the valley in this small narrow valley I spoke of and I would say to the best of my recollection is about half hilly, grazing land, and the rest is fairly level agricultural land.

Q. How about the east half of the northwest quarter and the northwest quarter of the northwest quarter of section 34?

A. That is rolling hills, grazing land.

Q. How about the southeast quarter of section 28, and the southeast of the northeast of 28?

A. The southeast of the southeast? [51]

Q. No, southeast quarter of section 28 and the southeast quarter of the northeast quarter, seems to be about the same there.

A. The north half of the southeast quarter is principally agricultural land, considerable bottom land; the south half of the southeast of section 28 is hilly, rolling hills, grazing land.

Q. And how about the southeast quarter of the northeast quarter of section 28?

A. That is what I would call principally bottom agricultural land.

Q. And how about the east half of the southwest quarter and the southeast quarter of the northwest quarter of section 28?

A. Southeast quarter of the northwest quarter is good agricultural bottom land and probably one-half of the northeast of the southwest quarter is good bottom agricultural land, the rest being grazing land; and the southeast of the southwest quarter is rolling hills, grazing land, as well as rocky as I now recall.

(Testimony of George Hayworth.)

Q. Now, do you know anything about the price of pasture, value of that land for pasture land such as that?

A. No, sir; I am not qualified to state what it would be worth; I can only state as to my being more or less familiar with grazing lands in Arizona and could unhesitatingly pronounce this as first-class grazing land, with water near at hand.

Q. You don't know as to the pasture value?

A. No, sir.

Q. I direct your attention to the east half of section 33, [52] did you see that? A. Yes, sir.

Q. Do you recollect how that looks upon the ground down there?

A. My recollection is that the northeast—

Q. I am asking if you remember how that looks down there? A. Yes, sir.

Q. Now, with reference to that how does the rest of the land in that enclosure compare as being similar land, that is, with reference to grazing?

A. Well, all of it is similar or better; agricultural land, of course, is adapted to grazing as well as agricultural purposes.

Q. What, if any notice, have you or the land department, general land office, to your knowledge ever given to these defendants requesting them to remove these fences?

Mr. WRIGHT.—Object to that, if the Court please, it is irrelevant and immaterial.

The COURT.—That would go to the proof of their good faith in maintaining them; it may be admitted.

(Testimony of George Hayworth.)

Q. You may state.

A. In order to explain the circumstances attending this unlawful enclosure I will have to go slightly into the history of it.

Mr. MORRISON.—The Court wants to hear—

The COURT.—The Court is not inquisitive.

(Mr. MORRISON.)

Q. We want to know, Mr. Hayworth, how long since they were first notified to remove those fences, requested it. [53]

A. Special Agent Quinn's report of this enclosure was referred to the U. S. Attorney of Arizona on November 4, 1908.

Mr. WRIGHT.—That is not responsive at all.

(By the COURT.)

Q. When did you notify them?

A. The notice came through the U. S. Attorney. The first record I have of any notice here is a report from the U. S. Attorney.

(The COURT.)

Q. When did you notify them?

A. I didn't inform them; that is the business of the United States Attorney.

Cross-examination.

(By Mr. WRIGHT.)

Q. You began your testimony by saying that that plat, Plaintiff's Exhibit "D," represented the enclosure of N. C. Bernard and the others, now why did you say that?

Mr. MORRISON.—Object to that, because it is admitted in the answer.

(Testimony of George Hayworth.)

The COURT.—He may answer.

A. I was reading from a notation that I then put on the plat, N. C. Bernard, et al.

Q. As a matter of fact, isn't that enclosure you have on that plat the enclosure of the Arivaca Land and Cattle Company?

A. This enclosure, as far as my information goes, was originally constructed by N. W. Bernard, and afterward maintained by separate ones, and as to the subsequent ownership, I am not qualified to testify except by hearsay.

Q. Isn't it only hearsay with you that N. C. Bernard constructed this fence? [54]

A. So far as I am concerned.

Q. So far as you are concerned, just hearsay?

A. I have no knowledge of the construction myself, simply made an examination of the fence as it existed.

Q. But you don't know who built it?

A. No, sir; not personally.

Q. You don't know who maintains it of your own knowledge?

A. No, sir; have no knowledge on that point.

Q. Was October 10, 1911, the last time that you was in that country?

A. What do you refer to by October 10, 1911? October, 1912?

Q. That the last time you were in that country?

A. No, sir.

Q. When were you there again?

A. I was there on April 19, 1912.

(Testimony of George Hayworth.)

Q. April 19, 1912. Did that map show the condition of the fence in April 19, 1912?

A. What was the question?

Q. Does that map show the condition of the fence at that time, April 19, 1912? Yes or no.

A. Partly.

Q. Where was the conditions changed?

A. The conditions were changed from on the south side of the enclosure, commencing about the center of section 33 and continuing easterly to a point about 1,000 feet west of the south quarter corner of section 35, and on the south line of the enclosure in section 2, of township 22 south, range 10 east.

Q. How much of the land that you have got there marked as Government land enclosed on this plat was eliminated on April [55] 19, 1912, when you examined the fences, all of it or just part of it?

A. All of the land marked in red was eliminated by the removal of the fences which I found removed on the date of my last examination, with the exception of about 40 acres in section 2, and the 40 acres above mentioned and described as the northeast quarter of the southeast quarter of section 35.

Q. Now, when you speak of agricultural land, you mean land that you could raise crops on if it could be irrigated, don't you?

A. Well, I mean either land that crops can be raised on by irrigation or that could produce—that the lay of the land was such that it could be cultivated and planted and a crop grown with or without irrigation.

(Testimony of George Hayworth.)

(The COURT.)

Q. Was this fence, when it was put up partially on Government land or was it on their own land?

A. When the fence was originally constructed?

Q. In October, 1911?

A. The fence on the red was entirely on Government land.

Q. That is, the fence that is adjacent to the road was entirely on Government land? A. Yes, sir.

Q. Both sides of that fence are Government land?

A. With the exception of some parts.

Q. That is referring to the northwest quarter of section 33. That is on this map, the lands outside of the fence are also Government lands except the northwest quarter of section 33, is that right? [56]

A. Yes, sir; the vacant lands are shown in red and were at the date of my examination.

Q. But the vacant lands within the enclosure shows in red? A. Yes, sir.

Q. And the lands outside of the enclosure are also vacant Government land? A. Yes, sir.

(Mr. WRIGHT.)

Q. How about the north side of sections 25 and 26 on the north side?

A. I haven't shown the status of section 26 for the reason—

The COURT.—I don't care anything about that. What I wanted to know was whether it came within the facts of that Union Pacific Case, entirely upon your own land, or whether part of it was on Government land.

(Testimony of George Hayworth.)

Q. The land to the north in 25 and 26, the land to the north of the fence wasn't Government land, you say?

A. Yes, sir; I said I had made no status report on those for the reason that the land within the enclosure bordering on that was entered land.

(Mr. WRIGHT.)

Q. What do you mean by agricultural land; you mean lands that can be irrigated, don't you?

A. No, sir; not necessarily; I mean lands that will produce a crop either by irrigation or natural rainfall.

Q. Would that land you speak of make a crop by natural rainfall? A. I don't know.

Q. Has it ever done it to your knowledge?

A. Not to my knowledge; no, sir. [57]

**[Testimony of Burton R. Green, for the
Government.]**

BURTON R. GREEN, called as a witness in behalf of the United States, and duly sworn, testified as follows:

Direct Examination.

(By Mr. MORRISON.)

Q. What is your name? A. Burton R. Green.

Q. What is your official capacity, if any?

A. Special Agent General Land Office.

Q. Were you such special agent—how long have you been such special agent?

A. Since about the first of October, 1911.

Q. 1911? A. Yes, sir.

Q. I will ask you if you know Mr. Hayworth?

(Testimony of Burton R. Green.)

A. Yes, sir.

Q. Did you accompany Mr. Hayworth when you and he road a fence down here in townships 21 and 22 south, of range 10 east? A. Yes, sir.

Q. You have in your hand a plat marked Government Exhibit "D." I will ask you to state whether that correctly represents the fence as you rode it?

A. Yes, sir.

Q. You have heard Mr. Hayworth's statement with reference to the character of land enclosed within the enclosure, with the exception of land in section 27, what have you to say, is that correct or not? A. Mr. Hayworth's statement is correct.

Q. You, I believe, returned there sometime in April, did you not, with Mr. Hayworth?

A. Yes, sir. [58]

Q. What did you find with reference to fences?

A. We found that most of the fencing on the south side of the enclosure enclosing public lands had been removed, with the exception of fence in section 2, township 22, south.

Cross-examination.

(By Mr. WRIGHT.)

Q. When did you make that examination?

A. Which one?

Q. You were just speaking of; the last one.

A. About April 19, 1912.

Q. Now, on April 19, 1912, what were the conditions of those fences there?

A. Most of the fences enclosing public lands had

(Testimony of Burton R. Green.)

been removed with the exception of portion in section 2.

Q. All been removed except that covered in section 2? A. Yes, sir.

Q. On April 19? A. Yes, sir.

**[Testimony of Robert J. Selkirk, for the
Government.]**

ROBERT J. SELKIRK, called as a witness in behalf of the United States and duly sworn, testified as follows:

Direct Examination.

(By Mr. MORRISON.)

Q. What is your name? A. R. J. Selkirk.

Q. What official position, if any, do you occupy?

A. Forest Supervisor.

Q. Where? A. The Coronado National Forest.

Q. Arizona?

A. Yes, sir; located in the vicinity of Tucson, Arizona. [59]

Q. In the vicinity of Tucson. Have you ever been down around Arivaca? A. Yes, sir.

Q. Do you happen to know anything about the lands which we have been talking about here?

A. I have been over this country several times; yes, sir.

Q. Does your recollection in regard to this land coincide with the statement of Mr. Hayworth in regard to what they are?

A. I am not familiar with the location of the fences, etc., by section corners, but I can give you a

(Testimony of Robert J. Selkirk.)

general idea of the character of the land in the Arivaca valley.

Q. Does your recollection of the character of the land coincide with Mr. Hayworth's statement?

A. Yes, sir.

Q. Now you may state, what in your judgment, that land is worth for pasture, grazing?

A. In my judgment, the bottom land, the valley land, is worth 25 cents per annum per acre.

Q. How about the other land?

A. The bench land is worth about 10 cents per acre per annum.

Q. And how about the land that Mr. Hayworth refers to as agricultural, you include that in the bottom?

A. That is the bottom land, agricultural land, that is for grazing purposes, I would consider it worth 35 cents per acre per year.

Q. You have had experience with reference to grazing matters on the forest reservation?

A. Yes, sir.

Q. And know prices charged there by the Government? [60] A. Yes, sir.

Q. How do prices compare with those you charge for similar land on the forest reservation?

A. The Forest Service leases pasture land at from 4 to 25 cents per acre, depending on the carrying capacity of the land or its value for grazing purposes.

Q. As to how many animals it will support?

A. Yes, sir; per acre.

(Testimony of Robert J. Selkirk.)

Cross-examination.

(By Mr. WRIGHT.)

Q. Mr. Selkirk, any of that land that you speak of could be homesteaded, couldn't it, under the homestead laws of the United States, that land around Arivaca? A. I think so.

Q. And under the homestead laws of the United States, isn't it a fact as to the law that you can live on 14 months and buy it for \$1.25 an acre?

Mr. MORRISON.—Object to that as immaterial, and not in any way representing the actual value of the land.

The COURT.—The Court takes judicial notice of those things.

Q. Do you know this particular land that is in controversy here?

A. Yes, sir; I have been over it a couple of times.

Q. How long ago have you been over it?

A. Probably two years ago.

Q. Did you go over it with an idea of looking over it carefully to see its value?

A. For grazing purposes?

Q. Yes. [61]

A. Yes, sir; usually do that, and when I go over the country take particular notice of that.

Q. How did you happen to go over this particular piece at that time?

A. We had recommended that a certain portion be withdrawn for a ranger station site, that is, several year ago; later we withdrew our recommendation.

[**Testimony of George N. Sayer, for the
Government.**]

GEORGE N. SAYER, called as a witness in behalf of the United States, and duly sworn, testified as follows:

Direct Examination.

(By Mr. MORRISON.)

Q. Are you familiar with the land which we have been speaking, you have been present?

A. Yes, sir.

Q. Acquainted with this land?

A. Passed over it a great many times horseback.

Q. Do you know anything about pasture rates in Arizona? A. No, sir; I don't.

Q. How long has that fence been down there, to your knowledge, Mr. Sayer?

A. What particular part?

Q. The southern part of it.

A. The last time I saw it, it was all up.

Q. When was the first time you ever saw that fence? A. I think it was March, 1907.

Q. And was there an enclosure there at that time?

A. There was.

Q. You saw it at various times from that time on down until you saw the fence, where evidence that the fence had been removed? [62].

A. I haven't seen it since it has been removed; don't know it is removed.

Q. The last time you saw it, was it substantially in the same condition as when you first saw it?

A. Several changes made.

(Testimony of George N. Sayer.)

Q. To what extent, increased?

A. Yes, there had been some increases made.

Q. When did you say was the last time you saw it?

A. I think it was about two years ago now, going on two years. I was familiar with it at that time.

**[Testimony of Arthur H. Noon, for the Government
(Recalled).]**

ARTHUR H. NOON, recalled for further examination by the United States.

(Examination by Mr. MORRISON.)

Q. You were present during part of the time when Mr. Green and Mr. Hayworth rode this fence in October, 1911, were you not? A. Yes, sir.

Q. You may state whether that was the identical fence that you and Quinn rode before that?

A. It was.

Q. Was it in the same condition?

A. Practically, except that little change that I mentioned of the few acres.

Q. Do you know in what county that land is?

A. Yes, sir; it is in Pima county.

Q. What State? A. Arizona. [63]

[Testimony of N. C. Bernard, for the Government.]

N. C. BERNARD, called as a witness in behalf of the United States, and duly sworn, testified as follows:

Direct Examination.

(By Mr. MORRISON.)

Q. Do you know where section 3, in township 22 south, of range 10 east is, Mr. Bernard?

(Testimony of N. C. Bernard.)

A. I know about where it is; know what direction.

Q. I will ask you if for some years past there has been a fence on that section?

A. I don't know whether there is any fence on section 3 or not; I don't know; I couldn't tell you what section it is on.

The COURT.—Suppose you look at this map, perhaps that will help you.

Mr. WRIGHT.—I object to calling the defendant as a witness on behalf of the prosecution.

The COURT.—Why?

Mr. WRIGHT.—On general principles.

The COURT.—Overrule the general principles.

(Mr. MORRISON.)

Q. Do you know where section 3 is?

A. On the map I do; yes, sir.

Q. Do you know where, about, that fence on section 3 is?

A. No, sir; I can't tell whether it is on section 3 or not.

Q. You remember about where the fence is?

A. By going out I could tell you where the fence ran and explain by different marks, not by section.

Q. From examination of that map don't you remember that particular part of the fence—you know where the desert land entry of Albenus Bogan is?

A. Yes, sir. [64]

Q. Immediately south of that you know some fences?

A. I know fences south of his but I don't know whether on section 3 or not.

(Testimony of N. C. Bernard.)

Q. You do remember fence south?

A. Yes, but not on section 3 or not.

Q. Do you know whether they are still there?

A. Yes, sir.

Q. On section 3? A. I don't know section 3.

Q. That fence is still there?

A. A piece of fence still there; yes, sir.

Q. Who owns the land that that big fence that has been there for so many years is situated upon?

A. Well, different parties own it.

Q. Any of it owned by the Arivaca Land and Cattle Company?

A. Some land big fence around; yes, sir.

Q. Any particular spot in there owned by the Arivaca Land and Cattle Company?

A. I think places around there that are owned by it.

Q. You think there are? A. Yes, sir.

Q. Then, your recollection is not in accordance with the records of the land office introduced here?

Mr. WRIGHT.—The record of the land office don't show where the title lays, shows where titles were given.

A. In section 28 there is a piece of land that the Arivaca Land and Cattle Company owns.

Q. There is? A. Yes, sir. [65]

Q. In section 28?

A. Now, I don't know whether that is in 28 or 29, got from a fellow by the name of Leonardo Lopez, is that in 28 or 29?

Q. I guess it is 29. Now, most of this fence, how-

(Testimony of N. C. Bernard.)

ever; is situated upon lands that belong to N. C. Bernard, John W. Bogan, and Albemus E. Bogan and George Push? A. That big fence?

Q. Yes.

A. Belongs to George Push, John Bogan and myself; I have a homestead that is inside of this fence.

Q. What about Albemus E. Bogan?

A. He has a desert land entry.

Q. Same fence is on?

A. That is in that valley there.

Q. Same fence is on?

A. It isn't one big fence there; is several cross-fences in it.

Q. Lanes there too? A. Yes, sir.

Q. I mean the outside fence? A. Yes, sir.

Q. That is land belongs to you, you are Mr. N. C. Bernard? A. Yes, sir.

Q. You and two Bogans and George Push, doesn't it? A. Yes, sir.

Cross-examination.

(By Mr. WRIGHT.)

Q. You or Push or the Arivaca Land and Cattle Company, or who is it building and maintain fences in section 2 that you spoke of? [66]

A. That Albemus Bogan has a desert land entry somewhere—I think he has some land in section 2, hasn't he?

Q. I just wondered if you knew who built the fence and maintained it?

A. I don't know who built the fence.

(Testimony of N. C. Bernard.)

Q. Who is maintaining it? A. Mr. Bogan is.

Q. And not the Arivaca Land and Cattle Company? A. No.

Mr. MORRISON.—Most of this fence is maintained by the men owning the land? A. Yes, sir.

Q. Now, Mr. Bernard, you recall the unfortunate circumstance of being arrested down there one time?

A. Yes, sir.

Q. Do you remember the date? A. No, I don't.

Mr. MORRISON.—If your Honor please, we desire to introduce the return of the marshal on the warrant issued for the arrest of the Arivaca Land and Cattle Company, O. C. Bernard, and Albemus E. Bogan, which shows that they were arrested on the 6th day of January, 1912, at Tucson, and the warrant returned in court on the 10th of January, 1912. We ask that your Honor allow us to introduce it in this case merely for the purpose of showing, illustrating and fixing the date as partially fixed in the testimony of Noon, that he saw it in the paper which was published after the arrest, and about two weeks thereafter they commenced to take the fence down.

Mr. WRIGHT.—I think there is objection to that as immaterial, [67] irrelevant and nothing to do with any of the issues in this case.

(Argument.)

The COURT.—I will leave it out if you admit the approximate date that Noon referred to as being shortly after January 6, 1912.

(Testimony of N. C. Bernard.)

Mr. WRIGHT.—When they began to remove the fence?

The COURT.—Yes.

Mr. WRIGHT.—I think that is about right.

The COURT.—It is admitted they began to remove the fence about January 20, 1912.

The COURT.—Mr. Wright, you do not have to admit that much, if you do not want to. You can admit that the date referred to by Mr. Noon in his testimony as the date on which he believes the fences were begun to be removed is about January 20th.

Mr. WRIGHT.—We will admit that just about that time.

[Testimony of J. E. Morrison, for the Government.]

J. E. MORRISON, called as a witness in behalf of the United States, and duly sworn, testified as follows:

Direct Examination.

(By Mr. RICHEY.)

Q. State your name and what official position, if any, you occupied during the last three years.

A. J. E. Morrison; United States Attorney for the Territory, now District, of Arizona.

Q. State what, if anything, during that period since November 1st, 1908, you did in your official capacity in reference to notifying the defendants in this action in reference to the removal of the fence or fencing, the subject of this action?

A. On February 18, 1910, I wrote a letter to Mr. N. C. Bernard [68] stating that it had been re-

(Testimony of J. E. Morrison.)

ported to the United States Attorney's office that he, in connection with John W. Bogan, Albemus E. Bogan and Ramon Ahmuda were unlawfully enclosing and obstructing unsurveyed public lands of the United States situated in parts of sections 27, 28, 33, 34, and 35, township 21 south, range 10 east, and parts of sections 2 and 3 in township 22 south, range 10 east; advising them that this was a direct violation, both of the criminal and civil, laws of the United States and that it had been referred to my office for prosecution; also stating that I did not feel that they intended wilfully to violate the law, but they were so doing by maintaining enclosures; also stating that I had no desire to put them to cost and trouble by the institution of civil and criminal proceedings and trusting that they would within fifteen days from date of the letter remove the fences; stating that unless this was done it would become my duty to proceed and that such action would be taken. On the same day I wrote a similar letter to John W. Bogan; on the same day a similar letter to Albemus E. Bogan; on the same day a similar letter to Ramon Ahumada. My files do not show any reply.

On May 24, 1911, I wrote to Ramon Ahmuda, N. C. Bernard, John W. Bogan and A. E. Bogan in separate letters, referring to my letter of over a year before, stating that I had written them such a letter and that they had not done me the favor of replying at all, and advising them that I would proceed shortly if they did not remove the fence. On May

(Testimony of J. E. Morrison.)

26, 1911, I received a letter from the stenographer of one John W. Wright, a gentleman representing the defendants, in which it is stated that Mr. George Push and Mr. N. C. Bernard had called at Mr. Wright's [69] office in Mr. Wright's absence, and that Mr. Push had stated that Mr. Bogan had no public lands fenced at all, except some places where his fence lines were crooked and take in by accident small patches of public domain. Mr. Bernard stated they had no public lands fenced.

Mr. WRIGHT.—I object to all this testimony.

The COURT.—I do not see how you can prove that by a letter of his stenographer.

A. I have a letter presumably from Mr. A. E. Bogan. Is the gentleman present? I have no way of knowing whether it is really his letter or not.

Q. Did you receive it in due course after your last letter to him in due course of mail?

A. I received it after my last letter; my last letter was May 26, 1911, this letter is dated June 6, 1911. He, however, states in the letter that he was absent when he received my letter.

The COURT.—That is, it simply did refer to your latter letter?

A. It is dated, "6/6/11. J. E. Morrison, Tucson, Arizona. Your letter received and contents noted."

Mr. WRIGHT.—I can't see the relevancy of these letters.

The COURT.—Good faith.

Mr. WRIGHT.—On the question of damages?

A. "Your letter received and contents noted.

(Testimony of J. E. Morrison.)

Your former letter I never received. I was in Mexico at that time. I have no partners and have no land in connection with anyone. The fence on my claim may not be on exact line. If it isn't I will see that it is changed. Am awful sick right now but [70] you can rest assured that I will do the right thing. I am sure that there must be some misunderstanding. I will have my brother J. W. Bogan call on you and explain everything. Yours truly." I may say my former letter to which he refers was mailed with my ordinary letter envelope official address and had not been returned.

On June 10, 1911, I again wrote Mr. A. E. Bogan, stating that he had been reported again by agents of the general land office, or had been reported and so on. Of course, I am unable to say whether you are doing this or not, but it seems strange the agents each make such report unless it is a fact. This is in answer to the letter which I just read, Bogan's letter. Of course, if you are doing so you are violating the law and you should be able to easily discover whether your fences are on the public domain or not. If they are they must be removed. If not, then you have not violated any law. I note that you state that you are sick at this time and assure you there is no intention of being hasty in the matter, but I would be very glad to hear from you again on the subject or see your brother when he will call upon me as suggested in your letter. Those were the notices sent to these gentlemen.

(Testimony of J. E. Morrison.)

(Mr. WRIGHT.)

Q. I will ask you to look there and see if you have a copy of letter of March 7th, 1912, addressed to me?

A. March 7, 1912?

Q. Yes. I will ask you if this is the original you sent me March 7th, 1912? A. Yes, sir.

Q. (Mr. WRIGHT.) I will ask that that letter be introduced in [71] evidence, if the Court please.

Mr. MORRISON.—No objection to it.

(Letter marked Defendants' Exhibit 1.)

(Mr. RICHEY.)

Q. Never was any offer on the part of the defendants to pay any of these costs incurred up to that time?

A. I rather think Mr. Wright did intimate that he would pay the costs.

(Mr. WRIGHT.)

Q. Didn't I state positively that we would pay and be glad to?

A. I think so; I don't know that you stated you would be glad to but would.

Q. Mr. Morrison, after you told me you were going to try the cases and I said the costs from now on we would insist upon you paying?

A. You certainly did; you said that.

The COURT.—Is that your case?

Mr. MORRISON.—I think so, but we will leave it open until morning.

The COURT.—We will adjourn until to-morrow morning. [72]

Wednesday Morning, May 8, 1912, 9:30 A. M.
Hearing resumed. All parties present.

**[Testimony of Robert J. Selkirk, for the Government
(Recalled).]**

ROBERT J. SELKIRK, recalled for further examination on behalf of the United States.

Direct Examination.

(By Mr. MORRISON.)

Q. Mr. Selkirk, in testifying yesterday you gave the charges of Forest Service with reference to the grazing of cattle on the Forest Reservations in Arizona; is that the total charge the Forest Service make?

A. The Forest Service makes a charge of from 4 to 25 cents per acre per annum for land that they allow enclosed, that is, for pastures, and in addition to that there is a regular grazing fee of 35 cents per head on stock per annum annually.

Mr. WRIGHT.—I object to that and move to strike it out as immaterial to the issues in this case.

A. (Cont.) Ranging within this enclosure.

Q. In speaking of enclosures, what do you mean by that Mr. Selkirk?

A. Pastures under permit.

Q. All enclosures of the Forest Reservations do you have permits? A. Yes, sir.

Q. Portions of them?

A. Portions of them, depending on the number of stock.

Q. What is the total charge, ordinary total charge?

A. Depends entirely upon the value of the land

(Testimony of Robert J. Selkirk.)

for grazing purposes that is enclosed.

Q. And such as was enclosed in this enclosure which we have been speaking and of which you are somewhat familiar personally? [73]

A. I would consider the agricultural portion of the enclosure worth 25 cents an acre per annum for grazing purposes; the mesa or bench land is worth about 10 cents an acre.

Q. Agricultural land, by that you mean all that is not in the hills?

A. Yes, sir; the bottom land in the valley.

Cross-examination.

(By Mr. WRIGHT.)

Q. Mr. Selkirk, as I understand the Government charges for grazing on the forest reserves in the neighborhood of 35 cents per annum for each animal?

A. Yes, sir; that is the Coronado.

Q. For grazing on the public domain where no forest reservation has been established the Government charges nothing for that?

A. No, sir; no charge.

Q. No charge at all? A. No, sir.

Q. Then, for pasturage in the forest reservation they charge from 4 cents per acre a year up to 25 cents? A. Yes, sir.

(Mr. RICHEY.)

Q. But they have no land in any of your forests anywheres near as good as any of this land?

A. We have no land leased on the Coronado forest that is equal in value for grazing purposes to this land; that is the agricultural portion of it. The

(Testimony of Robert J. Selkirk.)

hills, bench land, is very similar to land that we have leased in the forest.

Q. How many head of this 35 cent stock would you be able to graze per acre on this land down there that you are testifying [74] regarding?

A. On the bottom or agricultural land?

Q. Yes?

A. I believe that five acres of this land would carry one head of stock during the year, long season.

Q. And the bench land?

A. The bench land would probably require ten acres or more, ten to fifteen acres, depending largely upon the season.

Q. An average season?

A. An average season, perhaps—well, I would say probably fifteen acres.

(Mr. WRIGHT.)

Q. Did I understand yesterday you to say you hadn't seen this land for about two years?

A. It is about two years.

Q. You are testifying about the condition of this land two years ago? A. Yes, sir.

Q. You don't know what the condition of the land is since the last two years?

A. I get regular reports from the rangers.

Q. You yourself? A. Personally, no.

Q. You don't know? A. No.

The COURT.—Might have been some upheavels and mountains raised upon it, the agricultural portion of it.

(Testimony of Robert J. Selkirk.)

WITNESS.—This has been an exceptionally good year.

(Mr. WRIGHT.) [75]

Q. This has? A. Yes, sir; last year.

Q. But all that agricultural land has been taken up in the land office by claims, or do you know?

A. I don't know anything about that.

(Mr. RICHEY.)

Q. What is your judgment based on with reference to that land? A. My personal inspection.

Q. Over about how many years?

A. Well, that particular piece of ground I was on there for three or four different times covering a period of about two years.

Q. And how long have you been in the territory over desert lands and forest reservations?

A. I have been here constantly for the past twelve years.

Q. You base your statements upon your experience in the observation of lands in your official capacity? A. Yes, sir.

Mr. MORRISON.—That is the case your Honor.

Mr. WRIGHT.—I would like to recall Mr. Sayer for further cross-examination.

**[Testimony of George N. Sayer, for the Government
(Recalled—Cross-examination).]**

GEORGE N. SAYER, recalled for further cross-examination by the defendants:

(By Mr. WRIGHT.)

Q. Mr. Sayer, speaking of that enclosure that you testified on behalf of the Government yesterday, did

(Testimony of George N. Sayer.)

you ever put any of your animals in that enclosure?

A. Yes, sir. [76]

Q. Ever put any animals other than your own in?

A. I placed some on seizure by the Government.

Q. Any objection made to your placing them in there?

A. I have always asked them and they gave me permission to put them in.

(The COURT.)

Q. Asked who? A. The people in charge.

Q. The defendants or Government?

A. Ramon Ahamuda, foreman of the ranch.

Q. Foreman of the defendants' ranch?

A. Yes, sir.

(Mr. WRIGHT.)

Q. Ever charge you for putting them in there?

A. Never have.

Q. You ever know of any other cattle being in there? A. Never have.

(Mr. RICHEY.)

Q. In the matter of seizure and placing in pasture, any seized animals ever placed in any other pastures down there? A. All pastures convenient.

Q. Anybody charge you for placing any seized animals in pasture? A. Never paid a grazing fee.

Q. Common courtesy on the seizure of animals by the Government no charges made?

A. Yes, sir; and all places we happen to be handy to we place them in, that being convenient we always put them in there. [77]

Mr. WRIGHT.—If the Court please, at this time

the defendants move that this case be dismissed, that the defendants be decreed to pay all the costs accrued in this case up until April 19, 1912, and that the plaintiff be decreed to pay the costs subsequent to that time.

Now, if the Court please, no argument is necessary, I presume, to the effect that the case should be dismissed in so far as the injunctive remedy applied for is concerned. The witnesses show on behalf of the Government that on April 19, 1912, they examined this property and that all the fences upon the Government land had been removed, save and except a small piece of Government land in section 2, which, upon the admission of the territory as a State on February 14th, passed from the Government to the State of Arizona. Therefore, your Honor could not render a judgment such as the statute provides in this action now. The judgment which you would have to render is that the United States Marshal should go out and destroy all these fences upon the Government land, unless the defendants would within five days remove them. It stands without reason that you can enjoin a man to do something or not to do something which he has already done or refused to do. Therefore, so far as this injunction is concerned the case must be dismissed as to that, and I do not think that the United States Attorney will criticise that.

In the beginning of this case he stated that the only thing left in the cause was the question of damages. Now, if the Court please, in reference to this question of damages, the question which we have

had up before your Honor on several occasions, I produced authorities here yesterday which show that [78] where a statute created a new right or a new remedy that that was exclusive, but your Honor desired further information to this effect: That whether or not it did create some new right where none existed before, and your Honor felt that some right existed before, therefore, that there would be simply a cumulative remedy. That was my understanding of your Honor's doubts in the matter.

Now, in view of that, if the Court please, in the short time at my disposal, I tried to find out what the situation with reference to that would be. As read yesterday, a proceeding distinctly statutory may not be joined with an action at common law.

The COURT.—That proposition is not in question. That simply means that you cannot join two entirely adverse things. It does not mean that you cannot ask as consequential to a statutory remedy some additional relief directly in connection with that growing out of the same thing.

Mr. WRIGHT.—I was just referring to that because it was brought out yesterday. Yesterday we read where a statute creates an entirely new right, prescribed a particular remedy to the party injured, he is held to that exclusive remedy and no other.

The COURT.—There is no question about that.

Mr. WRIGHT.—If the Court please, we have got to analyze the statute just a minute. The statute says that the court in this summary proceeding, and it must have precedence on the calendar in this proceeding, the Court must order the United States

Marshal to remove those fences, unless the defendants remove them in five days. Now, if the Court please, without [79] that statute would the Court have a right to apply such a remedy as that?

The COURT.—Why not?

Mr. WRIGHT.—Because the only remedy the Court could give under the common law or equity would be to enjoin them to remove that fence within a certain number of days, and upon their failure so to do within a certain number of days, would be cited for contempt.

The COURT.—Has not the Court got the power to enforce its mandatory power by requiring the marshal to go out and do it?

Mr. WRIGHT.—Let me show the Court this theory. Where the right or duty is not created by the statute, now in this case for the purpose of this argument, this right is not created by the statute, but a common-law right, but the statute is remedial only. The statutory remedy is merely cumulative and the party injured may resort to either at his election. Now, the theory is, if the Court please, that if this is a cumulative remedy, the Government could take either one or the other of these remedies at its election but it could not apply both. Now, in this action the Government has chosen to take the statutory remedy, they have elected to take that, therefore the Government is debarred from joining with that the common-law remedy.

The COURT.—The trouble is, therefore, that doesn't follow as the night follows the day.

Mr. WRIGHT.—Why don't it?

The COURT.—Why does it in the sequence of things, in the logic of the thing. Suppose it is cumulative. Now, then, [80] for this particular way, i. e., to get the fence away, instead of sending the marshal out and abating, they instead bring an action at law to abate them, it brings a bill in equity, a statutory equity proceeding for the purpose of securing the removal of those fences. Now, the Government, if this is trespass, the Government is not limited—apart from this statutory remedy the Government is limited to a bill to abate the nuisance, the bill to abate the nuisance is not a cumulative remedy to the common-law right to bring an action for trespass, an action on the case, both of those rights exist, the Government can pursue both remedies at the same time, because they are not for the same ends; they are to secure entirely different and not inconsistent relief, to all of which the Government is entitled. In other words, if by reason of the fact that you have enclosed these lands unlawfully and have sent your cattle to graze there, you have thereby trespassed upon the Government's land. Now, there is a pretty question, whether, inasmuch as the grazing on the Government lands is permitted; it is a question whether grazing by one who has unlawfully enclosed public land is in itself a distinct trespass. I am inclined, however, to think it is; I am inclined to think as against him the license which the Government gives to the world at large is withdrawn and that license is revoked because of the unlawfulness of his act, and, therefore, he becomes a trespasser even though nobody else

would have become a trespasser if he had done the same thing. The fact that the trespass is committed, the Government would have its remedy by trespass, that wouldn't have anything to do with reference to getting the removal of these fences. The Government could surely come in by reason [81] of the common-law and abate the nuisance on its land by proceedings in court; wouldn't have to bring proceedings in court if it didn't want to; and in so far as this statute provides a remedy where the fences are on the Government land, not where they are on your own land, it is merely a cumulative remedy to that that theretofore existed on the part of the Government. In so far as the statute provides a remedy where the fences are on your land and not on the Government land it creates in the Government a new right and new remedy, because—well, I won't say even then it creates a new right because the supreme court has said it may be declared to be a nuisance to put up fences on your own land where the purpose is merely to do an unlawful thing. Still, without a statute declaring that sort of thing a nuisance it is a serious question whether any common-law court would have declared that a nuisance so as to permit it to have been abated.

Now, then, assuming that to be a new remedy, at least in part, it takes the place of the old common-law remedy. Not only of the old common-law remedy, but in many jurisdictions the remedy in equity to bring a bill to abate a nuisance, because in many jurisdictions you have got your choice, either to bring a bill, where the damage is a continu-

ing one and a serious one, bring a bill in equity instead of a proceeding at law. The usual remedy is at law to abate a nuisance. Now, whether or not you can join in a bill to abate a nuisance a claim for damages caused by the nuisance, whether equity taking jurisdiction of one part of the case will proceed to do full justice and not drive the parties to an action at law, is the really serious question in the case. [82]

Mr. WRIGHT.—May I put this thought in the mind of the Court, and I think it explains this law. As shown by the decision of the Supreme Court, it became the custom of these cattle-men who had the perfect right to graze their cattle over the vast acreage, these western barons, they began and fenced in thousands and thousands of acres of this Government land; they had the right to graze their cattle on it, but they went to work and put these fences around vast acres.

The COURT.—They shut the other fellows out. The damage is really to the other fellows and not to the Government.

Mr. WRIGHT.—They could graze on the land anyhow, but they shut the other fellow out and the Government says we have got to stop that and, therefore, they passed this law, when you build these fences the marshal will remove them unless you do it yourself in five days. Now, that law was passed 27 years ago and never in the 27 years since that time has damages ever been requested in any one of these actions so far as the records of the books show. Not in a single instance, I think, I have seen

them all, and the District Attorney cannot produce one.

Now, what is the situation, if the Court please? Take it among individuals, if you were the owner of 160 acres out here and you gave me permission to run my cattle over your 160 acres to graze my cattle, and you gave everybody permission to go and drive their cattle and feed them on my 160 acres, but I went down there and I put a fence around your 160 acres and grazed my cattle exclusively, you would have a right to come to me and say take that fence down, I won't stand for that because I want everybody to use for pasture. I would have to [83] take the fence down, but you couldn't claim any damages for that, unless the statute gave you a special right to obtain damages, because you have not been injured; the people who has been permitted to pasture would have been injured but you wouldn't, although you could tell me to take the fence down. Now, that is the full theory of this law, it was a new remedy. Do I make that clear?

The COURT.—That is the thing that is troubling me.

Mr. WRIGHT.—Would the contemporaneous construction that the statute for 27 years last past have some weight with your Honor?

Mr. MORRISON.—It hasn't been construed at all; how would it be a contemporaneous construction?

Mr. RICHEY.—There is just a few points that I desire to direct my remarks to, and that is the matter of the damages growing out of the illegal fencing.

This Court being the only court having jurisdiction of the action to bring about the removal of the fences, will assume jurisdiction of the disposition of the demand for damages, especially under the rule of avoidance of multiplicity of suits. It will not force the Government to bring several actions to dispose of one action where they can all be disposed of in one action, the one growing out of the other, but the one being, and the foremost suit being required to be brought in a court of equity and in this court. Where can these defendants be injured by this court disposing of all of the issues in this case? Where can the plaintiff be injured by disposing of all of the issues of this action? It would seem to us that both parties would be benefited by the disposition of the whole matter by this Court, [84] and it would seem that there is every reason that this Court should dispose of the whole matter rather than it should dispose of a part and force some other Court to dispose of another part, and, so far as we have been able to ascertain, there is no rule that would apparently take away from this Court its discretion which it possesses to dispose of these issues, and the Government contends that this Court has a right in this particular action, joinder of actions, to dispose of the whole, the damages and all, and we feel that if this Court may ascertain that the Government has been damaged that it has the right and it has the discretion and it would be a proper proceeding to dispose of the whole matter in the one action.

In reference to this statute that is in this case, the Court has stated there is no new right created, and

there is no new remedy created excepting in so far as to specify as to time and other points in the paragraph, and that is the only newness about the remedy. The Government could not resort to any other remedy for the removal of fences under this specific time, therefore, it is compelled to come into **this court**, and if it is compelled to come into this court there would seem to be no rule or no reason why we should not add the damages growing out of the infringement of this statute and infringement of the right. In reference to the Government not being damaged that is a mere assumption. There is no reason why the Government cannot at any time state that these lands shall not be used by anybody, the Government land, except that they pay for them. The Government says so long as a man complies with the law and so long as he doesn't try to hog the whole thing and to cut out his neighbors and everybody else, the Government [85] says you may go ahead, impliedly states go ahead, and raise your cattle on here, but when a person or set of persons want to take the whole thing and shut out their neighbors and the balance, the United States is not precluded from coming in and claiming that that is unfair and that therefore they shall pay them for it. And the Court has intimated that the Government, in a matter of this kind, might not be entitled to exemplary damages, but, we think, under the circumstances and in the action, that the Government should be entitled to them; that these defendants should be required to be penalized in this action besides the damages that the Government, we claim, is put to, and

that the right to graze and shutting out of the general public is two entirely different things, two entirely different conditions. Of course, the government in the first instance, does not make a contention that they can charge for pasturage on the public domain, but that doesn't preclude it from requiring payment for the use of the public land.

The COURT.—My main difficulty is this. I have got some difficulty about the joinder of the actions, because, ordinarily, a man is entitled to a jury trial in a trespass suit, and it is a serious question in my mind whether in a case like this, where there is a special statutory remedy, the purpose primarily being the abating of the nuisance, anything in the nature of profit to the defendant or damage to the Government, ought not to be determined by a jury as to the amount, and whether in the exercise of discretion the Court ought to leave it to the jury. That, however, is not the most serious thing.

Mr. RICHEY.—With reference to that, your Honor, the defendants in this particular action waived the jury and stated [86] they didn't want the jury.

The COURT.—Couldn't have a jury, ordinarily. But that is not my most serious difficulty. My most serious difficulty is on the right of the Government to collect damages.

Mr. MORRISON.—On the right of the Government to collect damages at all, your Honor?

The COURT.—Yes.

Mr. MORRISON.—In any event?

The COURT.—Yes. I will tell you where my

doubts are. The Government permits any and every body to use these lands for grazing purposes. It found out that some chaps were getting a tremendous advantage in this use by the freezing out the other fellows. There were several courses open to Congress when it found this out. It could have said, "We will stop this policy of allowing grazing on the public lands for nothing and we will charge every fellow who grazes on the Government land so much an acre, or so much a head." It didn't do that, because it felt the wise policy to leave the Government lands open to grazing. Then, it could have said, "But if any fellow encloses the Government lands so as to freeze out the other fellow, we will charge him so much an acre or so much a head." It didn't do that. It said, "If any fellow does this, we will put him in jail." Why? Because he is not injuring us, the Government, in our private capacity as the owner of the land; we are not suffering a bit of injury; it doesn't hurt that ground to be grazed upon. Anybody has the right to graze upon it; grazing is a different thing from felling timber; grazing is not any injury to the ground; it isn't damaging us one cent's worth; we are not losing anything by it; we don't intend even to make [87] this man pay for grazing any more than we make any other citizen pay for grazing, but we intend to hold him responsible because of the wrong that he is doing the other fellows who have the right to go on and graze, right equal to his own. Now, it is impossible for any one man who has been injured thereby to establish any distinct right or any distinct loss. I suppose anybody who

tries to drive his cattle onto an enclosed land and who is barred from that enclosed land by some individual who has no right to be there might bring an action of trespass to his person, and consequential damages that he has suffered by being unable to graze his cattle there. I suppose that might be a common-law right. In that way, any private individual who has suffered might at common law be satisfied by damages for his private loss. But the public wrong is not in the nature of damages to the Government as owner, but it is in the nature of creating a public disturbance, inviting these fights that naturally result when one fellow tries to usurp the right that belongs to everybody else, and for that sort of thing we will provide a criminal offense, but for the statute it wouldn't be a criminal offense, because trespass at common law or enclosing or anything of the kind is not a criminal offense; erecting fences upon the Government land is not a criminal offense. Now, query, did the Government have any right to sue these parties in trespass prior to the act of 1885; did the act of 1885 intend to control any remedy that there was any right that there was? Did it intend to make a criminal offense and the fine the exclusive rights of the Government? The erecting of the fences themselves on the Government land may well be a common-law trespass. But the damages would be [88] PURELY nominal on that. Putting the fences up there is no injury to the Government. I mean to say, looking at the Government now as a private land owner, it has thrown this land open to everybody to go on and graze, but not to put fences.

The man who goes on and puts a fence up is damaging the Government technically but not actually damaging the owner of that land; technically, yes, but not actually, so that there could be no recovery of anything but a penny, nominal damages, for that sort of a wrong. The fact that he thereby gets the exclusive grazing privileges, while it is a benefit to him, it is not a wrong to the Government in its private capacity as owner of the land; it is a possible wrong to individuals who wanted to come in and are prevented from coming in. That other party can, as I said, possibly sue for the injury done to him in his private capacity.

Now, as against that, the only argument that I have been able to see so far is the technical argument that the Government has thrown open this land to everybody and has given leave and license, but that by forbidding this unlawful act it has impliedly said, "We will withdraw that leave and license from you if you attempt to exert these rights, which anybody can exert, in an unlawful manner." It seems to me, however, that if the Government wanted to say that, if Congress intended any such result as that, that Congress would have said it in so many words, that Congress would not only have provided a criminal punishment, not only provided for abating the fences, but would have fixed in some way the measure of damages that should accrue to the Government and would have expressed the statement that leave and license given by general law and custom is withdrawn [89] as to anybody who has acted in this wrongful way toward his neighbor. Now, those are

the thoughts in my head, Mr. Morrison.

Mr. MORRISON.—Is your Honor satisfied about the joining of the actions?

The COURT.—If you convince me on the other point, I will not be much concerned about that, although I am very doubtful of it.

Mr. MORRISON.—Now, if your Honor please, because, as we all know, the Government of the United States owns this land, owns it in the same way as any private citizen who has a fee simple in the land, right to its use and occupation, and right to it for every purpose whatsoever. It is true that for many years there was and still exists an implied license, and it is strictly implied, if your Honor please, implied license on the part of the Government, where people should be permitted to allow their stock to graze upon the public lands of the United States. Nevertheless, if your Honor please, there was damage to those lands. The grass was eaten up, water was used, and so on, and if the United States had desired it could, and did in a great many instances, reserve large portions of these lands, from which it is to-day receiving revenue as appears in this case. The forest reservations, for instance, and the Indian reservations, the Government has Indian wards and is to-day receiving large amounts of money for pasturage collected from people who are permitted to graze their stock upon the Indian reservations. Therefore, if the Court please, the Government has the undisputed right and has exercised it, to take what portions of the public domain in its judgment are expedient [90] and reserved them and did collect rents and pasture fees for the

use of the lands so reserved. Now, taking that for a basis, we come then down to the Act of 1885. It is perfectly true, as both the Court and the counsel for the defense have said, that prior to that time, the cattle barons, and your Honor will notice that these gentlemen who appear here have not given any indication as to being specially poverty stricken and that they have covered a large portion of this land here with high-priced Soldiers' Additional Homestead Scrip. These things, if your Honor please, while lawful, but with these things, these scrips which but add to their ability to take up lands of the United States because they are able to buy it. If your Honor desired to go out here and get land, you could not get more than 320 acres unless you had some money to buy scrip with. That is to illustrate the exact situation in this matter, I mention those things, not particularly important, because they are lawful, those things, by these cattle barons. Then, by the act of 1885 the Government said, "Here. you people are not acting fair; the Government has been like a good father to you all; it said, 'Go out and graze your cattle on its land,' but you have gone out here to hog this land; you have gone out here and fenced up the lands and you are keeping, not only other people who have an implied right to graze their cattle on these lands, you are not only keeping them off, but the Government off, the owner off, because they are obstructing the lands of the United States which in this very statute it is forbidden; you are obstructing the lands and you are enclosing my land. What right have you to do this? You never have had any

such license; you never have had any agreement from me to do this thing, and you [91] are not only doing this, but you are keeping settlers from going on my land, and paying me fees and money for it." There is an element of damage, if your Honor please; there is one of the real reasons in Arizona to-day why this law is being strictly enforced. Twenty-five or thirty years ago, when they had a little, sparse population of 50,000 or 60,000, and a great many Indians, it didn't make very much difference if two-thirds of Arizona was fenced up, but to-day when we find our population increasing, people coming from various parts of the United States and elsewhere, coming here because they believe they can have free homes, because they believe they can settle and cultivate the land and get water and irrigate their desert entries and bring them into fruitful production, coming here for those purposes they find big fences here, and no threats, nothing like that, it is a rather dangerous thing you know to use actual threats and force. True, they didn't keep Noon from going in here; that is perfectly true. Any man will actually go in, if your Honor please, any Arizonan won't let a three-strand wire fence keep him from going in to get hold of public land, because he has a right to it if he wants it, but some people are not so constituted. But the point in this matter to which I am directing my remarks is that the Government has the right, and has always had the right, and has never ceased at any time to exercise its right and to demand that it be preserved, the right to have its public land open for settlement. That is the main idea, if your Honor

please. The main idea is that the land shall be open so that public lands shall be taken up by settlers and be plowed up and be planted, and that the wealth of the United States shall be increased in that way, that [92] the land fees shall be paid, that the land itself shall be paid for either by settlement and residence of the locator, and the accumulative wealth which comes to the United States through the improvement of it, or by the payment of cash for his land by the settler.

The COURT.—The trouble with this argument is that the enclosure does not in any manner protect him.

Mr. MORRISON.—I am giving your Honor the reason why such an energetic effort has been made in the last year or two—

The COURT.—No question about the importance of getting the unlawful enclosures of the land off, the question is whether the Government is entitled to damages for the trespass.

Mr. MORRISON.—Now we are come down to the act of 1885. We will say up to that time the Government had permitted this thing to go on, that is, the grazing upon public lands.
* * * We deny that this is the creation of a right at all or that any right was created by the statute of 1885; it is merely a method of carrying out this common-law right. Now, it was made unlawful in that act, if your Honor please; it was made a crime by that act to erect and, mark you, to maintain or **control, fences and enclosures** of the nature of which

we have heard in this controversy. It was made a crime to do that. Now, if your Honor please, let me make this suggestion to you. Does that statute mean a simple fence that is standing there? If your Honor please, nothing of the kind; it means the lands within the fence; it means the enclosure, not the enclosing, the enclosure, the land within the fence. That is what it means, and that enclosure is prohibited, and that enclosure is made unlawful. And, therefore, is it to be said that even if [93] these fences had been erected prior to 1885, that the acts of these defendants and their predecessors in interest in maintaining and controlling these enclosures, if your Honor please, after the erection and maintenance and control thereof had been declared unlawful, that their action is not such as withdrew their right, license or possible suggestion of any such thing on the part of the United States from them, and that they then must respond in damages to the United States for every bit of Government property which their stock or they in any way used which were at any time upon the lands of the United States which were in the unlawful enclosures, which they in violation of the law, of the criminal laws of the Government, maintained subsequent to the passage of this act. The question of actual damages, how much damages, is, of course, always for a court or a jury to determine, but the actual damages is there, if your Honor please. It seems to me clear, it seems to me that they cannot come in here and say, "It is true that we violated your own law for twenty or thirty years; it is true that you told us to take them down; we told you we

didn't have any fences; it is true we told you we would take them down and we didn't until you brought us into Court; then we took them down, and you are going to be stuck for the costs in this action." Is that the spirit of the law? Is that the spirit which moves a court of equity to say that on those actions the United States is not entitled to say that they have revoked any possible license that they have had and these men must respond to them for every bit, for every spear of grass that their cows and cattle ate, for every stick of timber that they took to build these fences, for every bit of physical property that they took [94] from the United States after, at least, they became guilty of the continuing crime of maintaining these enclosures for the many years past, and since the efforts of the Government officers in peace and in amity were made years ago to get them to quietly remove their fences and let the Government and they go about their business?

Now, if your Honor please, that is the way this case looks to the Government. The Government feels that it has been good, not too good, but that it has been fair to its citizens; that it let them drive their stock upon the public land and graze; that is all right, perfectly proper, no reason why it shouldn't but the Government feels that when people deliberately violate and continually, after notice, violate the criminal laws, that they thereby give up any right to any consideration at the hands of the Government, that they have thereby given up and parted with any right whatever to license at the hands of the Government, and that the Government

looking upon these acts and seeing in them the violation of its criminal laws is most conclusively presumed to have revoked any past license of any kind whatsoever for the use of its lands by these defendants.

Now, on the general proposition in these days when the trend of modern decision is so strongly in the direction of rapid steps, I do not believe that your Honor is going back to find some slight distinction of whether an action should have been brought in equity or at law when the difference is so infinitesimal as it is, when everything is before this court. This Government came into this Court and said to this Court, "We invoke your equitable powers because these defendants are maintaining unlawful enclosures and because the statute which is [95] in aid of our common law and says that that is the way we may do it in equity." How would it have looked, if your Honor please, had the Government at the same time or shortly before filed an action at law for damages in connection with the unlawful enclosure? Would it appear reasonable? Was it not the proper thing to do, reasonable thing to come into this court and say, "Your Honor, we invoke your equitable powers. We, by the filing of this bill, imposed upon your Honor the consideration and the disposition of equitable matters and your jurisdiction under the law and under the duty of the Court became fixed as soon as we filed that bill in this court. In that bill we ask for certain damages and state the reasons why we should have them. Now, subsequently these defendants remove the fences.

At the time, however, when the bill was filed the fences were up and the equitable powers of this court were properly invoked. Now, then, is it to be held that after the powers of the court of equity of the United States have been successfully invoked, and after complete jurisdiction has been obtained, can any defendant by his own act, and that act, if your Honor please, merely the outgrowth or the necessary result of a criminal action, that he shall then be able by that act to divest the Court of its jurisdiction?" And that is exactly what would happen in this case, because it is perfectly true that at this time, and not a moment earlier, if your Honor please, the Court is advised that the fences are removed, and that the equitable remedy is no longer necessary nor expedient. Certainly it would be an idle act, and no one stands here foolish enough to ask the Court to enter its order removing these fences when they have already been removed. But the jurisdiction [96] of this Court having vested under an absolutely and perfectly good cause of action, and connected therewith, there being a prayer and allegation sustaining it for damages in the bill of equity which warrants the jurisdiction of the court, that the defendants be permitted by tearing down these fences to divest this court of jurisdiction—

The COURT.—There is no question of that.

Mr. MORRISON.—That is the rule as to the question of damages. We have thought it over and doubt if we have any authority upon the subject. We, however, will say to your Honor that this is a most serious question in the west, and that if your

Honor is in doubt as to the right of the Government to collect damages, we suggest to your Honor that we be given further time to consider it and to file a brief on it.

The COURT.—I will give you all the time you want. My present view is against the right of the Government to make other than purely nominal damages, and in a suit in equity that would be nothing, and as at present advised I would dismiss this bill with costs on defendant. But, if you want further time to consider the question as to the right of the Government to collect actual damages in such cases as this, I would give you further time.

Mr. MORRISON.—Well, we would like a reasonable time, just a few days. We have been very busy here in Court.

The COURT.—Unless you convince me to the contrary, I shall dismiss this bill, but at the costs of the defendant. And then I hope that you will take the question up. I would like to see it passed upon by the upper court, whether the Government has the right to collect damages. I wish that it [97] had. I think it ought to have. I think that Congress might well have provided that where these cattlemen enclose and keep the public out that their right of free grazing is lost and that they should pay for the privilege of grazing. I think that would be a very wise amendment to the law. I think it ought to have been long ago. But, in view of the fact that it has not been done, in view of the fact that this law has been on the statute books nearly thirty years, 27 years, and that no attempt has ever been made

by the Government to collect rents or collect damages as the equivalent of rent, and in view of the fact that the policy of the Government still is to allow anybody to graze, I cannot believe that the Government is entitled to damages.

Mr. MORRISON.—There is a suggestion that there are some witnesses here from Tucson, and our witnesses are here—

The COURT.—Any facts you want to rebut?

Mr. MORRISON.—The suggestion would be, as your Honor is satisfied on that at this time, a purely question of law, your Honor might either delay the entry of your judgment, or enter judgment, and take it up on the motion for a new trial.

Mr. WRIGHT.—The suggestion, I think, is good that your Honor make the judgment you referred to, and that the District Attorney look up and if he can find anything on it, he will raise it in the motion for a new trial.

The COURT.—That is the motion to dismiss?

Mr. WRIGHT.—Yes.

The COURT.—Then the decision is bill dismissed and defendants' cost. [98]

State of Arizona,
County of Maricopa,—ss.

I, O. E. Schupp, hereby certify that the foregoing is a true and correct statement of the testimony and proceedings had in the case of the United States of America against the Arivaca Land and Cattle Company, on the trial of said cause in the District Court of the United States for the District of Arizona, had on the 7th and 8th days of May, 1912, before the

Honorable Julian W. Mack, Judge, presiding.

O. E. SCHUPP,

Stenographer.

Countersigned:

ALLAN B. JAYNES,

Clerk U. S. District Court.

By Earl S. Curtis,

Deputy Clerk. [99]

**[Certificate of Clerk U. S. District Court to
Transcript of Oral Testimony.]**

United States of America,

District of Arizona,—ss.

I, Allan B. Jaynes, Clerk of the United States District Court for the District of Arizona, do hereby certify the above and foregoing to be a true, perfect and complete transcript and copy of the original Transcript of Oral Testimony taken at the trial of said cause, as the same remains now on file and of record in my office.

Witness my hand and the seal of said Court, at Phoenix, in said District, this 31st day of August A. D. 1912.

[Seal]

ALLAN B. JAYNES,

Clerk.

By Earl S. Curtis,

Deputy Clerk.

[Endorsed]: No. 2180. United States Circuit Court of Appeals for the Ninth Circuit. The United States of America, Appellant, vs. N. C. Bernard, John W. Bogan, Albinus E. Bogan, and Ramon Haumada, Appellees. Transcript of Record. Upon Appeal from the United States District Court for the District of Arizona.

Filed September 5, 1912.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

No. 2180

United States Circuit Court of Appeals
For the Ninth Circuit

United States of America,
Appellant.

N. C. Bernard, John W. Bogan,
Albinus E. Bogan, and Ramon
Humada,
Appellees.

Brief of Appellant

Filed this _____ day of _____ 1912.

CLERK OF THE CIRCUIT COURT OF
APPEALS FOR THE NINTH CIRCUIT

J. E. MORRISON, United States Attorney,
J. C. FOREST, Ass't United States Attorney,
For The Appellant.

FILED

United States Circuit Court of Appeals For the Ninth Circuit

United States of America,
Appellant.

N. C. Bernard, John W. Bogan,
Albinus E. Bogan, and Ramon
Humada,
Appellees.

BRIEF OF APPELLANT

STATEMENT OF CASE

It is charged in the complaint filed in the court below, in brief, that the appellees had without right or authority of law, on or about the first day of November, 1908, knowingly, wilfully, recklessly, without the consent or permission of appellant, and in disregard of the rights of appellant, enclosed with fences 840 acres of the public lands of appellant, and that the appellees from said last mentioned date, continuously up to the date of the filing of said complaint, to wit, January 15, 1912, had maintained said fences and enclosure for their own exclusive use and occupancy, and had caused and permitted a large

number of cattle and other live stock belonging to the appellees to graze upon the lands embraced within said enclosure, to the actual damage of plaintiff in the sum of \$600.00, said damage having occurred between the above mentioned dates. Judgment is prayed that said enclosure be adjudged unlawful and that the appellees be ordered to remove said fences, in accordance with the statute in such case made and provided, to wit, the Act of February 25, 1885, for \$600, actual damages, and for \$500, exemplary damages. Prior to the trial of the case, the appellees removed the said fences, and the only questions before the court, at the trial of this action, were damages and costs. The trial court, upon showing being made that the fences had been removed, dismissed the case at the cost of the appellees, holding that the United States was not entitled to any damage, either actual or exemplary, under the facts, although evidence as to the actual damage fully appears in the record. From this judgment and decree notice of appeal was given, and the appeal being perfected, is now here for determination by this court. The sole matter at issue is the right of the United States to recover actual and exemplary damages, under the facts as they appear in the record.

ASSIGNMENTS OF ERROR.

ASSIGNMENT OF ERROR I.

The order and decree is contrary to the law, wherein it dismisses the suit, and thereby denies a judgment for damages in favor of the plaintiff, the evidence clearly showing that the plaintiff had sustained damage in a considerable amount, and the law being that plaintiff was entitled to judgment for such damage.

ASSIGNMENT OF ERROR II.

The order and decree is contrary to the facts, wherein it dismisses the suit, and thereby denies a judgment for damages in favor of the plaintiff, the evidence clearly showing that the plaintiff had sustained damage in a considerable amount.

ARGUMENT.

It clearly appears from the evidence that 840 acres were unlawfully enclosed by the appellees, and that all of said 840 acres were, at all of the times mentioned in the complaint, public lands of the United States. The title of the United States of America to its public lands is of the same character as title to land, in fee, held by a private individual. No one has the right to enter upon the public lands without the authority or consent of the Government, and certainly no one has the right to take property thereon being or growing, such as timber, or vegetation of any kind, unless license or authority of some kind is given such person. In the case of the Northern Pacific Railroad vs. Lewis, 162 U. S. 366; 40 Law Ed. 1002. Justice Peckham, in delivering the opinion of the court, uses this language:

“The absolute ownership of these lands being at the time in the United States, it had as owner the same right and dominion over them as any owner would have. No one had the right to enter upon the lands; no one had the right to cut a stick of timber thereon without its consent. Anyone so going upon the lands and cutting timber would be guilty of the commission of an act of trespass.”

The appellees, in violation of law, wilfully and knowingly, as fully appears from the evidence, erected fences upon the public lands of the appellant, and enclosed 840 acres thereof as a private pasture, within which they grazed their own stock, to the exclusion of all other live stock. The character of the land enclosed is fully shown in the testimony of the witness George Hayworth (pp. 49-54 T. of Ev.), and it appears therefrom that approximately two-thirds of the entire enclosure is composed of hilly, grazing land, and one-third of bottom land. Government's Exhibit D is a map or plat correctly showing the entire enclosure. Within the enclosure are approximately 840 acres of public lands of the United States, and the remaining acreage in said enclosure is covered with entries of various kinds made under the United States land laws. Of the 840 acres of public lands, as appears from the evidence, approximately one-third, or 280 acres, are bottom lands, and the remainder, or 560 acres, are hilly, grazing lands. The value of these two classes of land for pasturage is shown by the evidence of the witness Robert J. Selkirk (Page 60, T. of Ev.) as being twenty five cents per acre, per annum, for the bottom or valley land, and ten cents per acre, per annum, for the hilly, grazing or bench land, which makes a total value of the said 840 acres, per annum for pasturage, of \$126.00. The time during which the said 840 acres were so unlawfully enclosed being from November 1, 1908, up to and including January 15, 1912, approximates three and one sixth years, which at the rate of \$126.00 per annum, for pasturage, makes the actual damage to the United States the sum of \$399.00.

It will doubtless be contended that the United States, by permitting people for many years to graze their live stock upon its public lands, has created a tacit license that the public lands might be used for this purpose without recompense of any kind to the government. However, these appellees are not in the position where they can claim the advantage of any such implied license, or tacit consent, for the reason that, in violation of the criminal

laws of the United States and of the conditions of such license and consent, they fenced portions of appellant's public domain, thereby excluding all other people from the free enjoyment of such license, or consent, assuming the incidents of ownership and becoming wilful and unlawful trespassers.

Relating to the Act of February 25, 1885, the United States Supreme Court has said:

"This Act was passed in view of a practice which had become common in the western territories of inclosing large areas of lands of the United States by associations of cattle raisers, who were mere trespassers, without shadow of title to such lands, and surrounding them by barbed wire fences."

(Cameron vs. U. S. 148 U. S. 301.)

It must be understood that it is not by virtue of the said Act of February 25, 1885, that claim for damages is alleged in the complaint. At common law, without doubt, the United States could have maintained an action for the removal of such fences and for damages. The said Act of February 25, 1885, is but legislation in aid of the remedy which already existed at common law prior to the passage of said Act.

It surely cannot be the law that, as in this case, people who, not content with the free and common use of the public lands of the United States for stock grazing, deliberately and in violation of the statute, become wilful and flagrant trespassers, by fencing and enclosing public lands, and having thereby forfeited any right to consideration under any license or consent of the United States that its lands should be freely used by all for this purpose, should not respond in damages for the pasturage thus unlawfully afforded their stock.

Notwithstanding the fact that the United States, for many years, has permitted the inhabitants of the Western states to freely use its public land for the grazing of stock, the government has never given up its right to the exclusive dominion, control and regulation of the public land. The permission to use the public land for grazing has always been upon the condition that such license should be common to all, and when large stock owners began to fence the public lands and to exclude others from the common license to use them for such purpose, and to exercise the incidents of proprietorship therein, they violated the condition of such permission and license and became mere trespassers, and, after the passage of the Act of February 25, 1885, people so fencing the public land were not only trespassers but were also violators of the criminal laws of the United States.

"The general government has been consistent in its attitude of a proprietorship, which has enabled it, not only to maintain its possession, but to maintain its possession exclusively if it pleased to do so, and to prosecute those who have trespassed upon the public land if it has seen fit. That it has not always exercised the right of exclusive possession by action to prevent trespass or use is one thing; but that the right has always existed is another, and a wholly different matter. * * * The public lands belong to the United States and no trespass * * * even though countenanced for years by the government, can imply authority in the trespasser as against the United States or bar its right, at any time, to forbid a continuance of such trespass."

(U. S. vs. Shannon, 151 Fed. Rep. 863.)

"While the lands in question are all within the State of Colorado, the government has, with re-

spect to its own lands, the rights of an ordinary proprietor, to maintain its possession and to prosecute trespassers. It may deal with such lands precisely as a private individual may deal with his farming property. It may sell or withhold them from sale. It may grant them in aid of railways or other public enterprises. It may open them to pre-emption or homestead settlement; but it would be recreant to its duties as trustee for the people of the United States to permit any individual or private corporation to monopolize them for private gain, and thereby practically drive intending settlers from the market. It needs no argument to show that the building of fences upon public lands with intent to inclose them for private use would be a mere trespass, and that such fences might be abated by the officers of the government or by the ordinary processes of courts of justice. To this extent no legislation was necessary to vindicate the rights of the government as a landed proprietor."

(*Camfield vs. U. S.*, 167 U. S. 518; 42 Law
Ed. 260 (R. P. 262):)

"As there are, or were, in the state of Texas, as well as in the newer states of the west generally, vast areas of land over which so long as the government owned them, cattle had been permitted to roam at will for pasturage, it was not thought proper, as the land was gradually taken up by individual proprietors, to change the custom of the country in that particular, and oblige cattle owners to incur the heavy expense of fencing their land, or be held as trespassers by reason of their cattle accidentally straying upon the land of others. It could never have been intended, however, to authorize cattle owners deliberately to take possession of such lands, and depasture their cattle upon

them without making compensation, particularly if this were done against the will of the owner, or under such circumstances as to show a deliberate intent to obtain the benefit of another's pasturage."

(*Lazarus vs. Phelps*, 152 U. S. 82; 38 Law Ed. 363).

"The United States government has all the common law rights of an individual in respect to depredations upon its property."

(26 Am. & Eng. Encyc. of Law. 452.)

We are of the opinion that the sole ground upon which the appellees base their contention that they should not respond in damages to the appellant is that the government, for many years, has by implied license and tacit consent permitted the grazing of stock upon its public domain. Had such tacit consent and implied license never existed, we think it too clear for argument that action for damage could lawfully be sustained against appellees for the grazing of stock upon public land, whether fenced or not. It has been held repeatedly that, when persons permit their cattle to graze upon the lands within the National forests of the United States, wholly unfenced, they are liable in damages. Prior to the setting apart of the lands within the National forests, such lands were among those included within such tacit consent and implied license.

(*United States vs. Shannon*, 151 Fed. Rep. 863.)

By the Act of February 25, 1885, the government forbade and denounced as a crime the enclosure of public land of the United States by anyone not having title, or color of title thereto, or a claim of right, preferred in good faith with a view to securing title under the laws of the United States. Surely the passage of this Act and the contents thereof marked the final limit to any license or consent and anyone violating the terms of said act, in our judgment, entirely and irrevocably placed himself

beyond any such license or consent. This being true, and the facts in this case show beyond any question and on the direct admissions of the appellees, that they did violate the terms of said act, as well as the condition that the use of the public land for grazing purposes should be common to all, they placed themselves in the same position as if no such license or consent had ever existed, and therefore are liable in damages, as charged in the original complaint heren.

Should this court be of the opinion that exemplary damages are recoverable in equity, certainly this is a case of most wilful, deliberate and long continued trespass, after notices to remove said fences had frequently been given the appellees by United States officers, as fully appears from the evidence of the witnesses.

And not only, according to the evidence and particularly that of the witness A. H. Noon, did the appellees unlawfully exercise the incidents of ownership of the lands of the appellant, by erecting fences thereon and excluding all others from pasturing their stock within the enclosure, but they actually charged and collected pasture fees from other people. (Trans. of Evid., Page 39), whom they permitted to place stock within said enclosure.

Any license ever granted for any purpose has attached to it certain conditions, and if such conditions are not complied with by the licensee, he forfeits his license and all rights or privileges thereunder.

As we have shown, the only method by which damages in this case can be avoided is by the appellees pleading license and consent, thereby conceding that, were it not for such license and consent, they would be liable in damages. They have failed to keep the conditions of such license and consent, and thereby have forfeited the same and must respond to the United States in just damages.

The case should be remanded to the United States District Court for the District of Arizona with instructions to enter judgment against the appellees for the sum of \$399.00, actual damages, and for the sum of \$500.00, exemplary damages,

Respectfully submitted,

J. E. MORRISON,
United States Attorney for the
District of Arizona.

J. C. FOREST,
Asst. United States Attorney for
the District of Arizona.

No. 2180.

United States Circuit Court
of Appeals
For the Ninth Circuit.

UNITED STATES OF AMERICA

Appellant,

vs. •

N. C. BERNARD,
JOHN W. BOGAN,
ALBINUS E. BOGAN and
RAMON HUAMADA,

Appellees.

Brief of Appellees

JOHN B. WRIGHT,

Tucson, Arizona,

Attorney for Appellees.

United States Circuit Court of Appeals For the Ninth Circuit.

UNITED STATES OF AMERICA,
Appellant,

vs.

N. C. BERNARD,
JOHN W. BOGAN,
ALBINUS E. BOGAN and
RAMON HUAMADA,

Appellees.

No. 2180.

BRIEF OF APPELLEES.

STATEMENT OF FACTS.

This is a civil suit brought by the Government against the defendants, under the provisions of the act of Congress of February 25, 1885, 23 Stat. L. 321, Vol. 6 Federal Statutes Annotated, at pages 533 to 536.

The complaint alleges that about November 1, 1908, the defendants wrongfully enclosed 840 acres of the government land, and maintained such enclosure con-

tinuously up to the date of the filing of the complaint. The prayer is (a) that the defendants be ordered to remove the fences within five days from rendition of judgment, otherwise that the marshal be ordered to destroy same, (b) for actual damages in the sum of \$600.00, (c) for exemplary damages in the sum of \$500.00, and (d) for costs of suit.

The defendants demurred specially to said complaint upon the grounds that its allegations concerning actual and exemplary damages did not set forth facts sufficient to constitute a cause of action for such damages; that it joined a suit for statutory equitable relief by injunction, with a common law suit for damages in trespass, actual and exemplary; that the facts set forth were insufficient to constitute a cause of action for damages in trespass, actual or exemplary; and that the statute under which said action is brought does not provide for damages of any character whatsoever.

At the trial, the government witnesses testified, and the government admitted that the fences had been removed. Thereupon, the presiding judge dismissed the action and rendered judgment against the defendants for costs.

The government contended, and introduced evidence, subject to objection, in support thereof, that it was entitled to actual and exemplary damages for the unlawful enclosing of the land, and the adverse ruling of the trial judge upon that contention gives rise to this appeal.

THE LEGAL QUESTION INVOLVED

There is but one legal question to be determined, namely: In a civil action, prosecuted by the government under said act of Congress, can the court render judgment for actual or exemplary damages?

To decide this question correctly involves an examination of the conditions and customs pertaining to the public grazing lands of the United States prior to the passage of such act; of the facts and conditions which led to the passage of the same; of an analysis of the law itself; and of the consequent inability to fix a measure of damages in behalf of the government, as against one maintaining such an enclosure, all of which will be considered briefly.

The western lands were isolated; were far from the haunts of men; were enormous in extent; were inhabited by buffalo, elk and deer, and their only practical use was in the grazing of horses and cattle by the early pioneers. The cattle industry flourished, and in time vast herds were pastured and grazed by their owners, throughout the public domain. Thereafter, such owners began to put up fences on this land in order to better promote their interests. The government tacitly permitted all of these things, and the various state courts recognized and enforced the rights of the cattlemen in their ranges, and in and to the lands which they would fence and appropriate to their exclusive use. There were those, however, who took advantage of, and who abused the rights

and privileges thus allowed them, and began to fence vast tracts of land, and appropriate them to their exclusive use. This abuse became so great, and its consequences were of such evil effect, to the small cattle owners, who could not afford to enclose large acreages, as well as to intending homesteaders, that Congress finally intervened and passed the act of February 25, 1885. This act did not attempt to restrain the grazing of cattle on the public domain by any and all persons desiring so to do, but it made it a crime to enclose the public domain, and provided a summary injunctive remedy to destroy the fences.

Mr. Justice Miller, in speaking for the Supreme Court of the United States, in the case of

Buford vs. Houtz, 133 U. S. 326, says:

“We are of opinion that there is an implied license, growing out of the custom of nearly a hundred years, that the public lands of the United States, especially those in which the native grasses are adapted to the growth and fattening of domestic animals, shall be free to the people who seek to use them where they are left open and unenclosed, and no act of government forbids this use. For many years past, a very large proportion of the beef which has been used by the people of the United States is the meat of cattle thus raised upon the public lands without charge, without let or hindrance or obstruction. The government of the United States, in all its branches, has known of this use, has never forbidden it, nor taken any steps to arrest it. No doubt it may be safely stated that this has been done with the consent of all branches

of the government, and, as we shall attempt to show, with its direct encouragement.”

This doctrine is announced in Par. G, page 796, Vol. 32, Cyc., where many decisions are cited to sustain it, as follows:

“There is an implied license that the public lands of the United States shall be free to persons who seek to use them, for the purpose of grazing or pasturing stock, so long as the government does not forbid such use. This privilege is common to all who wish to enjoy it.”

Speaking of the said act of Congress of February 25, 1885, Mr. Justice Brown, in the case of

Cameron vs. U. S., 148 U. S. 305,

says:

“The act of Congress which forms the basis of this proceeding was passed in view of a practice that had become common in the western territories of enclosing large areas of lands of the United States by associations of cattle raisers, who were mere trespassers, withow shadow of title to such lands, and surrounded them by barbed wire fences, by which persons desiring to become settlers upon such lands were driven or frightened away, in some cases by threats or violence.”

In United States vs. Brandenstein, 32 Fed. 741, Justice Hoffman in referring to that act, says:

“That act, as the debates clearly show, was intended to prevent the inclosure and appropriation of vast tracts of public land, said to be millions of acres in extent, by associations of wealthy cattle owners known as “cattle kings”, without a shadow

or pretense of title. These tracts were surrounded by barbed wire fences, and all persons desirous of settling upon the land under the laws of the United States were rigorously excluded, in some cases by violence and threats. **Such enclosures the law was intended to prohibit,** and they were required to be demolished by the decree of the court.”
And now let us analyze the act itself:

Section 1 provides that all inclosures of public lands, made by a person without color of title, are unlawful.

Section 2 provides how the United States Attorney may commence suit, and what courts shall have jurisdiction **“to hear and determine proceedings in equity, by writ of injunction, to restrain violations of the provisions of this act,”** and in a proper case to render judgment **“for the destruction of the inclosure, in a summary way, unless the inclosure shall be removed by the defendant within five days after the order of the court.”**

Section 4 makes the violation of the act a misdemeanor.

It will be noted that this action is brought under the above laws. This was conceded to be a fact by the United States Attorney for Arizona, in the argument in the court below. The act is silent as to any damages—it provides merely a summary equitable and injunctive remedy. The act makes unlawful what was before lawful, because prior to its enactment, the government gave its implied license to so enclose the public domain. In making the inclosures unlawful, the act pro-

vided two remedies, namely: One a summary equitable action to destroy the fence, and another a criminal one. Had the government desired any pecuniary recompense, as a penalty for such unlawful inclosures, the act would undoubtedly have provided for damages and fixed a method of determining the amount.

Two observations seem pertinent at this time, namely:

1st. How would the amount of damages be determined without a statutory method being provided? The government says to these defendants—you can pasture your stock on my lands, and so can every other citizen, but you must not inclose the land so as to exclusively pasture it. Now, if these defendants violate the law and do inclose it, wherein is the government damaged? It is not the government that is damaged, but the damage results solely to those who are thereby deprived from pasturing their cattle on such inclosed land. The only possible damage to the government in pasturing cattle on its land, would be in the tramping and eating out of the grasses thereon growing. But this damage the government permits in its general license to graze cattle on its land, and this damage would result whether the land is inclosed or left open. For a violation of the law, the government has enacted two remedies only—one a summary destruction of the inclosure, and the other, a criminal prosecution. How, therefore, can the government go beyond these two remedies and ask for damage? The mere statement of the case shows the absurdity of the appellant's contention.

2d. If damages are allowable, why is it that the government has never sought such a remedy before? That act was passed twenty-seven years ago, and on numerous occasions it has been invoked. The writer of this brief asserts positively that he has examined every decision brought under that act, since its passage to the present time, in so far as such decisions are cited in the Century Digest, the Dicial Digest, and the General Digests, to date, and there is not a single instance in which damages have ever been invoked by the government, save and except the Wyoming case hereinafter referred to. We challenge the appellant to produce a single precedent for his action in this regard, with said exception. The excepted case referred to discusses the question of damages under said law. How the question came before the court is doubtful, but it is argued out in the decision, and the court decided against the damages, saying:

“The act under which the suit is prosecuted forbids two things: (1) The inclosures referred to; and (2) the assertion of a right to the exclusive use of public lands without right or color of right. **The actual use as distinguished from the assertion of the right to use, is not forbidden.** In a civil proceeding for the violation of this act, **there is no penalty prescribed, either for the use, or for the assertion of the right to use.** The only judgment which can, under the act, be rendered, in a civil suit, is for the destruction of the fence, and an injunction against its rebuilding.”

U. S. vs. Douglas Willan S. Co., 3 Wyo., 288;
22 P. 95.

It may be wise to put this matter in still another aspect. Prior to 1885, the government policy was to allow the fencing of the public domain. Such license was abused by the cattle owners, and so the government sought to annul the license. Now, until the government annulled the license, it was lawful to fence the public domain, and no damage could accrue to the government therefor. In annulling the license, the government, by said act provided that all inclosures **heretofore** or hereafter erected and maintained on the public domain are unlawful. It will be noted that the very act itself, impliedly admits that the inclosures erected before its passage were lawful, otherwise it would have been unnecessary to have decreed that all inclosures **heretofore** erected are unlawful. And in declaring that to be unlawful which was before lawful, the act provides penalties, namely, anyone who builds or maintains fences contrary to its provisions are subject to be enjoined, and to have such fences summarily destroyed, and are also guilty of a misdemeanor. No other penalties are provided. The result is that a law is passed which makes that unlawful which was before lawful, and particular penalties are provided for its violation. In this case, the government seeks to avail itself of the penalties provided by such law, and to then go beyond its provisions and attempt to invoke other penalties in the nature of damages, which were not provided for in or contemplated by such law. We submit that the impropriety of the attempt is manifest.

As heretofore stated, the cattle barons were abusing the implied license tolerated by the government in allowing them to fence public lands. Prior to the passage of the act of February 25, 1885, the government brought a suit to enjoin such fencing. The defense was, that the government had tolerated such action, and that it had been its policy to permit the fencing of the public domain. Justice Brewer, in commenting upon this defense, said:

“Even if the policy of the government heretofore had been to tolerate the occupation and inclosing of tracts of government land for grazing purposes; the fact that an action is now commenced to put an end to such occupation is conclusive that the policy of the government is changed.”

U. S. vs. Brighton Rancho Co., 26 Fed. 218.

As further showing the impossibility of collecting damages in this action, and of the correct decision of the lower court in dismissing the action upon proof that no fences were left standing we refer to the case of U. S. vs. Elliott, 74 Fed. 92, wherein a suit was brought by the government against Elliott, under the said act of February 25, 1885. At the time of the institution of the suit, Elliott maintained fences upon the public domain. At the time of the trial, however, the land had become a part of the school lands of Utah, owing to its admission as a state. Judge Marshall, in commenting upon those facts, said:

“It will be seen that the inclosure is no longer unlawful, under the act of February 25, 1885. No

law of the United States is violated, and no right or interest of the United States is affected by its maintenance. The right to abate it is therefore lost. The court sits to determine actual controversies, not moot questions. It follows that the complainant's bill must be dismissed."

Could the government have insisted in that case that the bill should not be dismissed, but that damages should be allowed the government for the fencing of such land, up to the time that it became the school land of Utah?

Upon the trial of this action, the government witnesses testified that all the fences complained of had been removed. Therefore, and in the language of Judge Marshall, "no law of the United States is violated," and as the court would not sit to determine moot questions, but only real controversies, the lower court did what Judge Marshall did, namely, dismissed the complaint—and rightfully so.

We pass then to another phase of the legal proposition, to-wit: Assuming that the government might obtain damages, actual and exemplary, for trespass, because of the fencing of the public domain, can such an action be joined with a summary statutory equitable action for injunction?

It must be conceded that the civil action provided for in Sec. 2 of the act of February 25, 1885, is an equitable one, for said section states that upon filing the suit, the court shall have jurisdiction "**to hear and determine pro-**

ceedings in equity by writ of injunction to restrain violations of the provisions of this act."

It must further be conceded that damages, actual and exemplary, for detention, injury or possession of real property is cognizable in a court of law.

The inevitable result is that the complaint herein joins in one count an equitable and a legal cause of action.

The law as to this is definitely and finally settled in so far as the federal courts are concerned.

"In the courts of the United States," says Justice Field, "the union of equitable and legal causes of action in one suit is forbidden, by the second section of the Process Act of May 8, 1792."

Hurt v. Hollingsworth, 100 U. S. 100.

Gaines v. Relf, 15 Pet. (U. S.) 9;

Fenn v. Holme, 21 How. (U. S.) 483.

"In the United States courts, legal and equitable claims cannot be joined in the same suit."

Kenton Co. vs. McAlpin, 5 Fed. 737;

Stafford Bank v. Sprague, 8 Fed. 377.

"The principle that legal and equitable claims cannot be blended together in one suit in a circuit court of the United States is too well established to admit of discussion."

Berkey v. Cornell, 90 Fed. 717;

Hudson v. Wood, 119 Fed. 764.

In conclusion of this branch of the argument, a mere

reference to the reason of the rule is sufficient. In law suits, a defendant under our constitution is entitled to a jury trial, but not so in equity. These defendants were entitled to a jury trial on the question of damages, but no jury would be allowed upon the question of an injunction against alleged unlawful enclosures.

We therefore pass to another phase of the legal questions involved, namely: Assuming that damages may be awarded in this action are facts sufficient alleged in the complaint to constitute a cause of action for actual or exemplary damages?

Stripping the complaint of formalities and of the allegations necessary to bring it within the provisions of the act of Feb. 25, 1885, we have left the following:

1st. That the United States owns certain sections of land.

2d. That defendants, on November 1, 1908, inclosed with barb wire fences parts of said sections, and have maintained such fences to the time of the commencement of the action, and have caused their cattle to graze upon the lands so fenced, to the actual damage of plaintiff in the sum of \$600.00.

3d. That by reason of the above facts, the plaintiff is entitled to recovery exemplary damages in the sum of \$500.00.

4th. A prayer for such damages.

We ask the court to read the complaint, and eliminate the formalities and the allegations necessary to bring it within the provisions of the act of February 25, 1885, and thus prove that we have fairly stated the case. The fact that the defendants grazed their cattle upon the lands so fenced, cannot be considered as an element of damage, because, as shown, the government gives them that privilege in any event.

So far as exemplary damages are concerned, they cannot be considered in this action, because the law is well settled that when a defendant is by statute criminally liable for a stated trespass, exemplary damages cannot be recovered.

“In an action for forcible entry upon, or for malicious injury to property belonging to another, either of which constitutes an offense punishable by the criminal law, only actual damages are recoverable.”

Moyer v. Gordon, 113 Ind. 282;

Biddall v. Maitland, 17 Ch. D. 174.

The theory of this is that exemplary damages are allowed, not by way of compensation to the wronged party, but as a punishment to the party committing the wrong. Therefore, if a criminal statute is enacted to cover the case, the party committing the wrong must be punished under that statute, and not be punished by the infliction of damages, otherwise he might be placed twice in jeopardy for the same offense.

In this case, a criminal statute is enacted, and these defendants may be punished under its provisions, and they are not therefore, subject to exemplary damages.

In so far as actual damages are concerned, we submit that there is nothing in the complaint upon which to base them, and for the reason that all facts alleged must be considered in reference to the laws appertaining thereto.

The facts alleged are that plaintiff owned land, and that the defendants wrongfully inclosed part of such land and grazed their cattle in such enclosure. The law pertaining to such facts is that the defendant had the right to graze his cattle on such land, whether it was enclosed or otherwise. The government, therefore, was in no way damaged by the grazing of the cattle. Originally there was an implied license to enclose the land, but later the government passed a law making it unlawful so to do, and prescribed a penalty, namely, if one violate the law, he is guilty of misdemeanor or the enclosures will be summarily destroyed. If the law is violated, however, the government is not damaged. The reason is that the land is held in trust by the government for all citizens of the United States. The government gives all citizens the right to the possession of said land, that is, the right to graze cattle thereon. If one incloses a part of this land, and uses it for his exclusive use, other citizens who have equal rights to the possession thereof, and to graze their cattle thereon,

are deprived of this right. These other citizens are, therefore, damaged by being denied a right, but the government itself is in no way harmed.

The purpose of going into this is to demonstrate the necessity of the rule of law, which provides that the facts predicated damages must be alleged in a complaint for trespass.

It might well be that under some extraordinary circumstances the government's lands would be seriously damaged by an unlawful inclosure thereof. If such circumstances existed, it would be necessary to set them forth in the pleadings. Here no such circumstances are alleged, nor were they attempted to be proved.

This brings us for a moment to the question of the evidence given in this cause to prove damages. We refer to this evidence, merely to demonstrate our legal contentions above set forth. Otherwise a reference to the evidence would be impertinent. This evidence was from three or four witnesses who testified to the annual rental value of the land for grazing purposes. Now, let us suppose that these witnesses were absolutely correct, and that the land, for grazing purposes, was worth, for instance, \$10.00 per acre per year. Is that the measure of damages in this case? Manifestly no, because the injury would be solely to the possession of the land, and not to the land itself, and because the government permits all persons to occupy and graze upon the land free of cost. And yet, that kind of evidence was the only

evidence offered in support of the allegation of damages in the complaint. If the government had suffered any character of damage to the land itself, evidence to prove it would have been excluded, because the facts to permit such proof, had not been set forth in the pleadings.

It will be remembered that at common law only one form of trespass upon real estate existed, namely, trespass **quare clausum fregit**, and to maintain this the plaintiff had to be in possession, and the action was for injury to the possession. Later, by the statutes of Westminster, a new action was created, to-wit, trespass **on the case**, which enabled the owner of the fee to obtain damages for trespass, independent of possession.

To sustain the former action, plaintiff had to allege and prove an injury to the possession. To sustain the latter action, plaintiff had to allege and prove an injury to the land itself.

The above legal propositions are clearly pointed out and discussed in an exceptionally able opinion of Judge Burwell.

Casey v. Mason, 8 Okla. 665; 59 P. 252.

The question is likewise fully discussed and the same identical rules of law are announced, in Mr. Waterman's work on Trespass, Vol. 2, Sec. 987. This is, however, elementary law, and will be conceded.

In the Oklahoma case, *supra*, the plaintiff alleged that he was the owner in fee of certain real estate; that the defendant entered such lands and plowed up thirty acres, to the plaintiff's damage in the sum of \$100.00. It will be noted that it was not alleged that plaintiff was in possession; and no injury to the land was set forth. The injury alleged was an injury to the possession. A demurrer to the complaint was therefore sustained. The court said:

“* * * was the plowing of plaintiff's land an injury to the real estate? The petition nowhere alleges that the land plowed was meadow or grass land, or that appellants did any injury to any improvement. It only alleges that the appellants plowed plaintiff's land, to his damage, etc.; but before we can say that the plaintiff suffered any damages by reason of the defendants' plowing his land, **he must allege some state of facts that will show that the plowing damaged his real estate.** Plowing land would be an injury to the possession, but not to the real estate, unless it were done under such conditions as would damage the soil, or destroy grass or some other grain or herbage, or improvements attached to the soil. But we think that **the allegation that the defendants plowed plaintiff's land, without a further statement of facts showing how such plowing injured his land,** is not sufficient to justify a recovery for damages to his real estate.”

In conclusion, we apply the above elementary rules of law to the case at bar.

The government did not allege that it was in possession of the sections referred to in its complaint, but merely alleged that it was the owner in fee of such sec-

tions. As a matter of fact, the government was not in possession of such lands, because it had turned the possessions over to citizens of the country generally for the purpose of pasturing cattle thereon. The fencing of the land in this case was like the plowing of the land in the Oklahoma case, an injury to the possession only. No facts were alleged in the complaint in the Oklahoma case showing how the plowing of the land damaged the real estate, and it was therefore properly held insufficient to justify a recovery for damages to real estate.

No facts are alleged in the complaint in this case, showing how the fencing of the land damaged it, and it is therefore insufficient to justify a recovery for damages to such real estate.

We believe the rulings of the lower court were correct, and should be affirmed.

Respectfully submitted,

JOHN B. WRIGHT,

Attorney for Appellees.

No. 2180

**United States Circuit Court of Appeals
For the Ninth Circuit**

United States of America,
Appellant.

vs

N. C. Bernard, John W. Bogan,
Albinus E. Bogan, and Ramon
Humada.

Appellees.

Reply Brief of Appellant

Filed this _____ day of _____ 1912.

CLERK OF THE CIRCUIT COURT OF
APPEALS FOR THE NINTH CIRCUIT

J. E. MORRISON, United States Attorney,
J. C. FOREST, Ass't United States Attorney,
For The Appellant.

FILED

United States Circuit Court of Appeals For the Ninth Circuit

United States of America,
Appellant.

vs

N. C. Bernard, John W. Bogan,
Albinus E. Bogan, and Ramon
Humada.

Appellees.

REPLY BRIEF OF APPELLANT

ARGUMENT

One of the main contentions of the appellees is that the license, so often referred to in the briefs herein, included a permission to fence the public land, at least prior to the Act of February 25, 1885. Were this true, we are still at a loss to see how the appellees can take advantage thereof, because it clearly appears from the record that the fences in question were by them, erected, owned, maintained and controlled long after the passage of the said act, and the United States is not attempting to recover for anything that may have happened prior to the adoption of the said last named law. On page nine of appellees' brief, it is expressly stated that the enclosing of the public land, in the manner done by the appellees, was an unlawful act under said law. This being true, these appellees never, so far as this litiga-

tion is concerned, had any right, license, authority, or permission of any kind to erect the fences, or to maintain and control them.

But, notwithstanding the well known ability of the counsel for the appellee, he is confounded in his argument by all of the decisions which he quotes, with reference to the extent of the license and permission prior to and since the Act of February 25, 1885. The gentleman has cited the leading case on this subject, and quoting from the very excerpt of the opinion which he inserts in his brief, we show that not only was the fencing of the public land not a part of the license, but that it was a condition of the license that no such fencing should be done.

"We are of opinion that there is an implied license, growing out of the custom of nearly a hundred years, that the public lands of the United States, * * *, shall be free to the people who seek to use them WHERE THEY ARE LEFT OPEN AND UNENCLOSED * * *."

Buford vs. Houtz 133 U.S. 326; 33 Law Ed. 618.

It will also be observed that, in the citation from Cyc., Volume 32, Page 796, appearing in appellees' brief, it is stated that the implied license is for the purpose of permitting grazing and pasturing stock, and that this privilege is COMMON TO ALL WHO WISH TO ENJOY IT.

On page seven of appellees' brief the question is asked: "How would the amount of damages be determined without a statutory method being provided?"

It occurs to us that the answer to this question is easily found. As pointed out in appellant's opening brief, the United States, in the same manner as other proprietors of land, at common law, could and did recover damages for trespass without any positive statutory method being prescribed. The act of February 25, 1885, merely provides a method by which the unlawful enclosure may be sum-

marily removed and persons offending against the statute prosecuted criminally. This in no way affects the right of the government which it has always had under the common law to recover damages for trespass on its property.

On page eight the appellees demand to know why, if damages are allowable, the government has never sought such a remedy before. Whether it is true or not that the government has never attempted to recover damages in actions similar to this is wholly immaterial. The case cited by appellees, (*U. S. vs. Douglas Willan S. Co.*, 3 Wyo. 288; 22 Pac. 95), which holds that the only judgment under the act of February 25, 1885, that can be rendered is for the destruction of the fence and an injunction against its rebuilding, is clearly not in point, as no damages were prayed for or alleged in the bill.

It will be seen that Mr. Justice Brewer, in commenting upon the said license in the case cited on page ten of appellees' brief, (*U. S. vs. Brighton Rancho Co.*, 26 Fed. 218), carefully refrains from stating that the enclosing of tracts of public land was included in such license.

Directing our attention to the point raised on page eleven of appellees' brief, to the effect that a cause of action for damages, being itself an action at law, cannot be joined with an action to abate the unlawful enclosure, under the said Act of 1885, we insist that it is almost elementary that this may be done. It is a firmly established principle that jurisdiction having been once properly obtained in a court of equity, that court will proceed to hear and determine all incidental questions which may pertinently arise in the litigation. Section 2 of the said act of February 25, 1885, provides, among other things:

"and jurisdiction is also conferred on any United States District or Circuit Court, or Territorial District Court, having jurisdiction over the locality where the land enclosed, or any part thereof, shall be situated, to hear and determine proceedings IN EQUITY, by

writ of injunction, to restrain violations of the provisions of this act."

It must therefore be conceded, that, in so far as the portion of the action relating to the removal of the unlawful enclosure, this suit was properly brought in equity. As the learned trial judge, in commenting upon the facts in this case, said the appellees could not and did not, by the simple removal of the fences, oust the court of jurisdiction with regard to the question of damages involved. The principal object of this suit was to procure the removal of the fences, and the question of damages was incidental, but entirely pertinent. The jurisdiction of the court of equity, having been successfully and properly invoked, it became its duty and it had full power to proceed and award damages or deny them, under the allegations of the bill. Equity alone could have afforded the relief sought, with reference to the removal of the unlawful enclosure, for, had we proceeded under the common law right of the United States, such action would have been in equity and in the Act of February 25, 1885, it is especially provided that proceedings of this nature shall be in equity. Having thus stated our position, we cite the following conclusive authorities on this question:

"Where equity can alone afford the entire remedy sought, the fact that legal questions are also involved cannot oust the court of jurisdiction."

Gormley vs. Clark, 134 U. S. 338; 33 Law Ed. 909;

"It is not an objection to the jurisdiction of equity that legal questions are presented for consideration, which might also arise in a court of law. If the controversy be one in which a court of equity only can afford the relief prayed for, its jurisdiction is unaffected by the character of the questions involved."

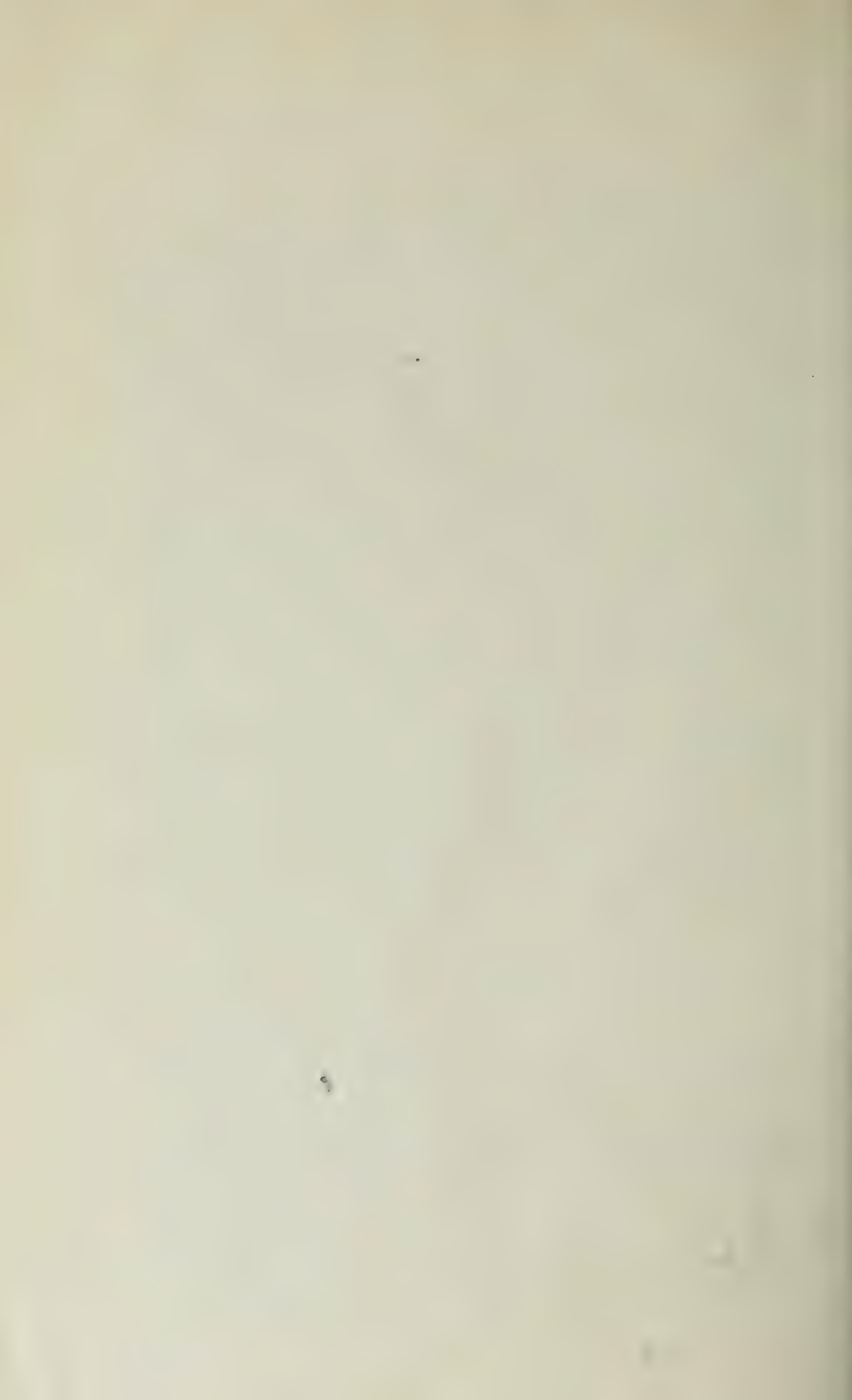
Holland vs. Challen, 110 U. S. 15; 28 Law Ed. 52;

On page thirteen of appellees' brief, the appellees request this Court to find whether or not the facts alleged in the complaint are sufficient to constitute a cause of action for actual or exemplary damages. They then proceed to dissect the complaint, after their idea of what it contains, and, even in their version, the cause of action for damages is clearly and sufficiently stated. It is alleged that the appellees on November 1, 1908, enclosed the land and maintained the fences up to the time of the commencement of the action, and caused *their* cattle to graze upon the lands so fenced, to the damage of the government in the sum of \$600.00. This is not a damage for injury to the land but is one resulting from the loss by the government of reasonable fees for pasturage, such as are charged and lawfully collected upon national forests and Indian reservations. All of the argument, therefore, with reference to any injury to the *land* of the appellant is wholly immaterial. An examination of the amended answer of the defendants below, shows that no demurrer or special plea of any kind whatsoever was interposed in the Court below. The appellees now, for the first time, attempt to raise the question of the sufficiency of the bill, a position which, under the circumstances, unless this Court should find that the bill is hopelessly insufficient, they are conclusively deemed to have waived by their failure to demur in the lower Court.

Respectfully submitted,

J. E. MORRISON,
United States Attorney for the District of Arizona

J. C. FOREST,
Asst. United States Attorney for the District of Arizona.



No. 2184

United States Circuit Court of Appeals
for the Ninth Circuit.

EMPIRE STATE SURETY COMPANY

Plaintiff in Error.

VS.

NORTHWEST LUMBER COMPANY,

Defendant in Error.

TRANSCRIPT OF RECORD

Upon Writ of Error to the United States District Court
for the Western District of Washington,
Northern Division.

Lowman & Hanford Co., Seattle

RECEIVED

SEP - 4 1912

FILED

SEP 10 1912

No.

EMPIRE STATE SURETY COMPANY

Plaintiff in Error.

vs.

NORTHWEST LUMBER COMPANY.

Defendant in Error.

TRANSCRIPT OF RECORD

Upon Writ of Error to the United States District Court
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*In the District Court of the United States for the Western
District of Washington. Northern Division.*

NORTHWEST LUMBER COMPANY,	}
<i>Plaintiff and Defendant in Error.</i>	
VS.	
EMPIRE STATE SURETY COMPANY,	
<i>Defendant and Plaintiff in Error.</i>	}

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COMPLAINT.

Plaintiff complains against the defendant and for cause of action alleges:

I.

That the plaintiff is a corporation duly organized, created and existing under and by virtue of the laws of the State of Washington, with its principal place of business in Seattle, King County, Washington, and has paid its license fee last due.

II.

That the defendant is a corporation duly organized, created and existing under and by virtue of the laws of the State of New York and has filed its Articles in the office of the Secretary of State of the State of Washington, with its principal place of business in Seattle, King County, Washington.

III.

That on or about June 27, 1908, the defendant made, executed and delivered to the plaintiff, its certain insurance policy, wherein and whereby the said defendant insured the plaintiff against loss resulting from the liability imposed by law upon the plaintiff on account of bodily injuries incurred by any employee or employees of plaintiff whose compensation is included in the estimate given in statement Number Eight of the schedule annexed to said policy, during the year beginning July 1, 1908, and ending on the first day of July, 1909, to the amount of Five Thousand Dollars (\$5,000.); and said defendant further agreed that it would at its own cost, undertake the settlement of any claim for injuries during said period, or the defense of any suit instituted, and prosecution of any appeal therein.

IV.

That at said time there was a crew of men engaged in getting out logs for plaintiff, working under a sub-contractor, all of which was known to the defendant, and that in said crew was an employee named John Hall, and the said Hall's wages with the wages of all the other employees working for said sub-contractor, were included in the schedule of statements in No. 8 of the defendant's policy of insurance, and the plaintiff was required by the defendant to pay a premium on the said wages including the wages of the said John Hall, in the sum of Two Hundred Forty-three Dollars (\$243.), which sum plaintiff paid to defendant and which sum the said defendant accepted.

V.

That on or about November 4, 1908, the said John Hall, one of the employees who was engaged in getting out logs,

and whose wages were included in the said schedule, was injured, but the plaintiff had no reasonable means of getting information as to Hall's injury, and plaintiff did not learn of said Hall's injury until long after the said injury happened, and the first information that plaintiff had of such injury was the service of summons and complaint in an action for damages brought by the said John Hall against this plaintiff, and the failure of the plaintiff to learn of said injury at an earlier date was due to no fault or neglect of the plaintiff.

VI.

That immediately upon the service being made on this plaintiff of the summons and complaint in said action, this plaintiff notified the defendant of the claim, and thereupon the defendant undertook the defense in said action and was by the plaintiff given full information of every kind at the command of plaintiff, and said defendant was fully informed as to the conditions under which the said Hall was working at the time of his injury, and plaintiff was guilty of no fault or neglect of any kind, whatsoever, which was in any way prejudicial to the defendant in this action.

VII.

That thereupon the defendant, through its counsel, caused an answer to be prepared for this plaintiff, and this plaintiff caused the said answer to be verified by its president, in which answer no claim was made that the plaintiff in the said suit brought for damages for personal injuries, was working under an independent contractor, and thereafter a judgment was rendered in said cause against this plaintiff in the sum of Ten Thousand Dollars (\$10,000.).

VIII.

That thereafter said cause was appealed to the Supreme Court of the State of Washington, but the defendant refused to bear any of the costs of said appeal, and this plaintiff was obliged to bear all the costs of said appeal, and to employ its own attorney to prosecute the said appeal, and the costs of said appeal, including the costs taxed against this plaintiff

in favor of the respondent on the appeal, amounting to the sum of Three Hundred Fifty Dollars (\$350.).

IX.

That plaintiff paid to the defendant the premium reserved in the said policy of insurance, and fully and completely complied with all the conditions and covenants contained in said policy of insurance to be performed on the part of this plaintiff.

X.

That a reasonable attorney's fee for this plaintiff's counsel in prosecuting said appeal, is the sum of Two Hundred Fifty Dollars (\$250.).

XI.

That the judgment of the lower Court against this plaintiff was duly affirmed, and on or about February 10, 1911, this plaintiff was obliged to pay on account thereof, the sum of Ten Thousand Six Hundred Eighty-three and 50/100 Dollars (\$10,683.50).

XII.

That plaintiff has demanded payment from defendant of the amount provided for by its policy of insurance as above set forth, in the sum of Five Thousand Six Hundred Dollars (\$5,600.), no part of which has been paid.

Wherefore plaintiff demands judgment against defendant for the sum of Five Thousand Six Hundred Dollars (\$5,600.) with interest at the legal rate since February 11, 1911, together with the costs and disbursements of this action.

BYERS & BYERS,

Attorneys for Plaintiff.

Filed April 22, 1911. D. K. Sickles, Clerk.

ANSWER.

Comes now the said defendant, and for answer to the complaint herein states:

I.

That for answer to the second paragraph thereof, it denies that its principal place of business is at Seattle, Washington, but admits the other allegation therein contained.

II.

That for answer to the third paragraph thereof, it admits that on or about the 27th day of June, 1908, it executed and delivered to the plaintiff an insurance policy which would remain in force from the first day of July, 1908, to the first day of July, 1909, but denies each and every other allegation therein contained.

III.

That for answer to the fourth paragraph thereof, it denies each and every of the allegations therein contained.

IV.

That for answer to the fifth paragraph thereof, it denies each and every of the allegations therein contained.

V.

That for answer to the sixth paragraph thereof, it admits that shortly after the commencement of the action of John Hall against the plaintiff pending in the Superior Court of King County, Washington, notice thereof was given by the plaintiff to this defendant, but denies each and every of the other allegations therein contained, and specially denies that the plaintiff ever informed the defendant that the said John Hall was working under an independent contractor or subcontractor, until about the time said cause was all ready for trial and after the issues had been made up.

VI.

That for answer to the seventh paragraph thereof, it admits that plaintiff caused an answer to be prepared, which was verified by the President of the plaintiff, and that no claim was made that the said John Hall was working under an independent contractor, and it admits that judgment was rendered for \$10,000., but denies each and every of the other allegations therein contained.

VII.

That for answer to the eighth paragraph thereof, it admits that said cause of Hall against the plaintiff was appealed to the Supreme Court of the State of Washington, but denies

each and every of the other allegations therein contained, and denies that there were costs in the sum of \$350. or in any other amount, for which the defendant is liable.

VIII.

That it denies each and every of the allegations contained in the ninth paragraph thereof.

IX.

That for answer to the tenth paragraph thereof, it denies that the sum of Two Hundred Fifty (\$250.) Dollars, or any other sum whatsoever, is a reasonable sum to be recovered for an attorney's fee, or that any attorney's fee is recoverable at all.

X.

That for answer to the eleventh paragraph thereof, it has no knowledge or information sufficient to form a belief as to whether any account whetsoever was paid by the plaintiff, and therefore denies the same.

XI.

That for answer to the twelfth paragraph thereof, it admits it has paid no part of the sum of \$5,600., but denies each and every of the other allegations therein set forth.

XII.

Further answering said complaint, the defendant alleges that the answer first prepared and served in the case of John Hall vs. the plaintiff was prepared upon information furnished by the plaintiff and its officers and agents, and in accordance with the information furnished, and that no claim was made that the said John Hall was working under a sub-contractor, or independent contractor, until long after the said answer was filed, and until about the time this suit came on for hearing, when an amended or substituted answer was filed.

By way of a first affirmative defense, defendant alleges:

XIII.

That before assuming by its counsel the burden and responsibility of entering upon the defense of the case of Hall against the plaintiff pending in the said Superior Court, it was

expressly agreed and understood in writing between the plaintiff and defendant that by the defendant's entering into the defense of said cause by its counsel, it should not waive any of its rights under the policy because of the fact that the plaintiff had not complied with the terms of the policy, fully set forth in the bill of particulars and on file herein, but that all rights for and on behalf of the defendant were duly reserved and preserved, to be used and enforced at any time and in accordance with said understanding, and not otherwise, defense of said suit was made by defendant's counsel, and it now seeks to enforce its rights under said policy here, and as set forth in this and the following affirmative defenses, which allegation aforesaid is hereby made a part of each following affirmative defense, and herein expressly referred to as such.

XIV.

That the plaintiff did not notify the defendant at any time of the accident to the said Hall, who was working for it, and that the first information that defendant had of the accident was when the suit was brought and the summons and complaint brought to its attorney John P. Hartman for consideration and action, which notice was more than twelve months after the accident occurred.

XV.

That in the action aforesaid, where the said defendant reserved its rights, by the verdict of the jury and the judgment of the court it was established that said plaintiff Hall was not working for an independent contractor, but was working for and in the employ of the plaintiff in this cause, and as such recovered the amount set forth in the complaint in this cause, thereby relieving the defendant herein of and from all liability in this action, but notwithstanding the judgment defendant's attorney joined in the appeal to the Supreme Court, with the express understanding of assuming no liability, and reserving all rights, but upon the request and at the solicitation of the plaintiff and its attorneys.

By way of a second affirmative defense, defendant alleges:

XVI.

That paragraph B of the insurance policy involved in this cause of action provides as follows:

"B. This policy does not cover loss or expense arising on account of or resulting from death or injuries suffered or caused by (e) the failure of assured to observe any statute affecting the safety of persons or any local ordinance of which Assured has knowledge."

XVII.

That the cause of action brought by the said Hall against the plaintiff referred to hereinbefore was based upon the failure of the plaintiff to observe the laws of the State of Washington providing for the guarding of dangerous machinery commonly known as the Factory Act, and furnishing a safe place for the plaintiff's employee to work, and that the judgment rendered in favor of said Hall against the plaintiff was upon the ground, among other things, that plaintiff had failed to comply with said act and provide a safe place for its employees to work, all contrary to the statutes of the State of Washington.

By way of a third affirmative defense, defendant alleges:

XVIII

That paragraph F of this policy of insurance involved in this cause of action is as follows:

"F. Assured on the occurrence of an accident in respect of which claim can be made under this Policy shall at once give written notice thereof to the Company at New York or to the Company's duly authorized agent. Assured shall give like notice with full particulars of any claim made on account of an accident so reported, and if steps are taken to enforce such claim by suit or otherwise Assured shall also deliver to the Company all papers and information pertaining thereto immediately upon receipt thereof, wheerupon the Company shall at its own cost undertake on behalf of and in the name of Assured the settlement of such claim or the defense of such suit and the prosecution of any appeal which it may undertake."

XIX.

That the plaintiff herein wholly failed and neglected to give the defendant notice provided for under said section F, or any notice whatsoever, and by reason thereof defendant herein was not aware of said injury until long after same had happened, and was not able to make a prompt investigation or ascertain who were the witnesses to the accident or know the facts, and that by failure of the plaintiff to comply with the requirements of said section F, defendant was greatly damaged and prejudiced, and by reason thereof defendant was and is discharged and released from all liability under or by reason of its said policy of insurance.

By way of a fourth affirmative defence, defendant alleges:

XX.

That paragraph G of this policy of insurance involved in this cause of action is as follows:

"G. Assured shall when requested by the Company aid in securing information or evidence and the attendance of witnesses and in effecting settlements and in the prosecuting of appeals but he shall not without the written consent of the Company interfere in any negotiation for settlement nor in any legal proceedings nor voluntarily assume any liability, loss or expense other than as herein specifically provided for except that he may provide at the time of the accident and at the cost of the Company such immediate surgical relief as is then imperative."

XXI.

That the plaintiff herein refused and neglected to aid in securing information or evidence and the attendance of witnesses in the defense of said cause, as it was bound to do under its policy, and that by reason thereof the defendant herein was not able to make the defense as it might have been made otherwise had the plaintiff done its part, and that by the failure of the plaintiff to comply with the requirements of said section G the defendant was greatly damaged and prejudiced and that by reason thereof the defendant was and is discharged and released from all liability under said policy of insurance.

By way of a fifth affirmative defence, defendant alleges:

XXII.

That the plaintiff did not comply with the terms, conditions, obligations and requirements of said policy of insurance, all to the great prejudice of the defendant in the cause of action brought by Hall aforesaid, and thereby damaging and injuring the said defendant, wherein it was compelled to pay and did pay out in the defense of said cause a large sum of money in excess of \$500.00, and because thereof it is released and discharged from all obligation under said policy.

Wherefore, having fully answered said complaint of the plaintiff, this defendant prays that it may be dismissed hence with its costs.

JOHN P. HARTMAN,
Attorney for Defendant.

REPLY.

Comes now the plaintiff in the above entitled action and for its reply to the answer of the defendant herein, denies each and every allegation contained in Paragraphs 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22.

Wherefore plaintiff prays judgment as in its complaint herein.

BYERS & BYERS,
Attorneys for Plaintiff.

VERDICT.

We, the jury in the the above entitled cause, find for the plaintiff \$5,778.00.

WILLIAM DUNLAP, Foreman.

JUDGMENT.

This cause came on for trial on the 4th day of June, 1912, the plaintiff appearing by its attorneys, Messrs. Byers & Byers and Elmer E. Todd, Esq., and the defendant appearing by its attorney, J. P. Hartman, Esq., and a jury was duly impaneled and sworn, and evidence was introduced on behalf

of the plaintiff and on behalf of the defendant, and the jury having heard the arguments of counsel and the instructions of the Court, on the 7th day of June, 1912, returned a verdict in favor of the plaintiff in the sum of Five Thousand Seven Hundred and Seventy-eight (\$5,778.00) Dollars;

Wherefore by virtue of the law and the aforesaid premises

IT IS ORDERED, ADJUDGED AND DECREED that the plaintiff do have and recover from the defendant the sum of Five Thousand Seven Hundred and Seventy-eight (\$5,778.00) Dollars with interest at the rate of six per cent (6%) per annum from the 7th day of June, 1912, with its costs and disbursements herein taxed in the sum of

Done this 11th day of July, 1912.

C. H. HANFORD, Judge.

ORDER.

This cause coming on this day to be heard upon defendant's motion for a further extension of time within which to serve its bill of exceptions, plaintiff being represented in court by its attorneys Byers & Byers, and the defendant appearing by its attorney John P. Hartman, and the court being fully advised in the premises, it is, by the court

ORDERED that the time within which the defendant's bill of exceptions may be served in the above cause be, and the same hereby is, extended to and including the 1st day of August, 1912.

Done in open court, this 10th day of July, 1912.

C. H. HANFORD, Judge.

BILL OF EXCEPTIONS.

Be It Remembered, that this cause came on duly and regularly for trial on the 4th day of June, 1912, before the Hon. C. H. Hanford, one of the judges of the above entitled court, the plaintiff appearing by its attorneys Byers & Byers and Elmer E. Todd, and the defendant appearing by its attorney, John P. Hartman, and a jury was duly impaneled and sworn to try the cause, when the following proceedings were had, and the following exceptions taken:

EXCEPTION 1.

That to sustain the issues on behalf of the plaintiff it offered testimony as follows:

That on or about June 27th, 1908, the defendant executed and delivered to the plaintiff a certain insurance policy whereby the defendant insured the plaintiff against loss resulting from liability imposed by law upon the plaintiff, on account of bodily injuries incurred by any of the employees thereof, whose compensation was included in the estimate, and that the insurance policy was in writing and offered in evidence without objection, which policy is as follows:

Incorporated under the laws of the
State of New York.

THE EMPIRE STATE SURETY COMPANY of New York.

IN CONSIDERATION of Three Hundred Forty and 20/100 Dollars (\$340.20) Advance premium and the Statements hereinafter set forth in the Schedule of Statements, which are hereunto attached and made part of this Contract, and which Statements the Assured makes and warrants to be true by the acceptance of this Policy, except any statements which in the Schedule are declared to be estimates, the **EMPIRE STATE SURETY COMPANY**, hereinafter called the Company, **HEREBY INSURES NORTHWEST LUMBER COMPANY** hereinafter called the Assured, for a period of 12 months; beginning on the first day of July, 1908, noon, and ending on the first day of July, 1909, noon, standard time as to both dates, at the place where this policy has been countersigned.

1. **AGAINST LOSS RESULTING FROM THE LIABILITY IMPOSED BY LAW UPON ASSURED FOR DAMAGES** on account of death or bodily injures, suffered as the result of an accident occurring while this policy is in force, (a) by an employee or employees of Assured whose compensation is included in the estimate given in Statement Number 8 of the Schedule, while at any place designated in said statement, by reason of the prosecution of the work therein described; (b) by any driver or driver's helper enumerated in said statement.

2. Also against the costs or defense in any suit, whether groundless or not, brought against Assured and based upon

death or bodily injuries suffered or alleged to have been suffered by any person or persons described in Clause 1 (above) at the places and under the circumstances therein described, and as the result of an accident occurring while this policy is in force.

A. The Company's liability for loss in respect of death or bodily injuries is limited to the amounts as provided for in Statement Number 3 of the Schedule and in addition to such limit the Company will pay medical expense as is provided for in Clause G and any expense which it may incur in defending any suit under this policy, including costs taxed against the Assured by the Court.

B. This Policy does not cover loss, nor expense, arising on account of or resulting from death or injuries suffered or caused by (a) any person employed in violation of law as to age, nor under the age of fourteen years where there is no legal age limit (b) any contract-convict-laborer; (c) any employee whose compensation is not included in the estimate in Statement No. 8, but this exclusion shall not apply to drivers employed by Assured, who are specifically enumerated in any concurrent Teams policy carried by Assured in this Company, while such drivers are engaged in duty other than that of driver, nor to Assured if any individual or co-partnership, nor to the President, Vice-President, Secretary or Treasurer of Assured if a corporation; (d) any person while riding or attempting to ride upon any elevator or hoisting device which cannot be operated directly by the person riding thereon, but this exclusion shall not apply to mine elevators operated in conformity with the mining laws of the State, nor to any employee engaged in installing, repairing, or inspecting an elevator or hoisting device; (e) the failure of assured to observe any statute affecting the safety of persons or any local ordinances of which Assured has knowledge.

C. The premium is based upon the entire compensation, whether salaries, wages, piecework, overtime, board or allowance of any kind earned during the Policy period by the employees of Assured engaged in the operation of the business described in Statement Number 8 and not herein elsewhere specifically excluded. The advance premium shall be computed

at the rates named in the Schedule, and for the Policy period, on the basis of the entire compensation as therein estimated. If, however, Assured so elects, a deposit premium amounting to not less than the minimum premium named in the schedule shall be paid, in which event Assured shall submit a statement at the expiration of each month, showing such entire compensation for the period of one month then expiring and shall thereupon pay to the Company the earned premium based upon such monthly compensation, the deposit premium to be applied to the adjustment of the final statement of compensation filed with the Company. The amount of such compensation shall be exhibited by Assured to the Company in a written statement of all wages or other compensation earned by employees during any part of the term of this Policy supported by affidavit if required and such statement shall be furnished at the expiration of the Policy period, but the rendering of such statement or any settlement thereon shall not bar an examination of Assured's books nor the Company's right to additional earned premium found upon such examination of Assured's book to be due. The Company shall have the right and opportunity at all reasonable times while this Policy is in force and within one year of its termination, to examine the books of Assured so far as they relate to wages or other compensation of employees. The earned premium shall be adjusted in accordance with the terms of this clause of the Policy at the rate specified in Statement Number 8. If the earned premium thus computed and reported to the Company is greater than the advance premium paid, the Assured shall immediately pay the additional earned premium to the Company; if less the Company shall return to the Assured the unearned portion, but in any event, the Company shall retain the minimum premium provided for in Statement Number 8.

D. The Company shall have the right and opportunity while this Policy is in force to inspect the plant, works, machinery and equipment used in the business referred to in the Schedule and this Policy may be suspended until any serious defects or obvious dangers, found upon inspection and reported to Assured or to his authorized agent, are removed to the satisfaction of the Company. Notice of such suspension and the

reason therefor to be stated in writing and delivered or mailed to Assured or to his authorized agent at the address given in the Schedule. Re-instatement of the Policy shall be made in like manner and the Company will on demand pay to the Assured a return premium for the period of such suspension pro rata.

E. This Policy may be cancelled at any time by either party upon not less than five days written notice to the other party, stating when thereafter cancellation shall be effective and the date of cancellation shall then be the end of the Policy period. If cancelled at Assured's request or at Assured's request upon suspension from business, the earned premium shall be computed upon the basis of the compensation earned to date of cancellation and adjusted pro rata as provided in Clause C. If such cancellation is at Assured's request and the business of Assured is placed in the hands of a Receiver, Assignee, or Trustee, the compensation of employees for the full original Policy period shall be computed upon the basis of the compensation earned to date of cancellation and customary short-rate premium charged thereon, which shall not be less in any event than the minimum premium provided for in Statement Number 8. Notice of cancellation mailed or delivered to the address of Assured or his authorized agent as herein given shall be a sufficient notice and cash or a check similarly mailed or delivered shall be a full compliance on the part of the Company but no earned premium shall be payable until the actual earned premium shall have been determined as provided in Clause C and reported to the Company. If the business of Assured is placed in the hands of a Receiver, Assignee, or Trustee, this Policy shall immediately terminate without prejudice to Assured's rights respecting any accident theretofore occurring and reported to the Company. Any change in title or ownership as respects Assured shall in like manner terminate this Policy unless consented to by Rider or Endorsement executed as required by Clause K. If Assured is an individual and his death occurs during the term of this Policy then this Policy shall continue for a term not exceeding thirty days from the date of such death for the benefit of Assured's legal representatives and thereupon terminate. Any assignment of interest under this

Policy shall be void unless the consent of the Company is given by Endorsement or Rider bearing the signature of an executive officer of the Company .

F. Assured on the occurrence of an accident in respect of which claim can be made under this Policy shall at once give written notice thereof to the Company at New York or to the Company's duly authorized agent. Assured shall give like notice with full particulars of any claim made on account of an accident so reported and if steps are taken to enforce such claim by suit or otherwise Assured shall also deliver to the Company all papers and information pertaining thereto immediately upon receipt thereof, whereupon the Company shall at its own cost undertake on behalf of and in the name of Assured the settlement of such claim or the defense of such suit and the prosecution of any appeal which it may undertake.

G. Assured shall when requested by the Company aid in securing information or evidence and the attendance of witnesses and in effecting settlements and in the prosecution of appeals, but he shall not without the written consent of the Company interfere in any negotiation for settlement nor in any legal proceedings nor voluntarily assume any liability, loss or expense other than as herein specifically provided for except that he may provide at the time of the accident and at the cost of the Company such immediate surgical relief as is then imperative.

H. If Assured carries a Policy of another insurer covering against loss or expense arising under this Policy he shall not be entitled to recover from the Company a larger proportion of such loss or expense than the sum hereby insured bears to the whole amount of the insurance.

I. In case of payment of loss under this Policy the Company shall be subrogated to the extent of such payment to the rights of Assured in respect of such loss against any person or persons and Assured shall execute any and all papers required to secure the Company such rights.

J. No action shall lie against the Company upon this Policy unless brought by Assured to re-imburse himself for the actual payment of money, as follows, to-wit: (a) any settlement of a suit upon a claim for damages brought by any of

the persons, and under the circumstances, described in Section I, of the insuring clause, after final judgment in such suit or in settlement of such claim, before or after suit or final judgment upon the written authority of the Company; (b) in defense of such suit or in the settlement of Court costs provided for in Clause A or of medical expense provided for in Clause G; provided that any action brought under sub-section (a) of such clause shall be brought within ninety days from date of such judgment and provided that the Company does not by this clause prejudice any defenses to such action that it may be entitled to make under this Policy. Any limitation or requirement of this Policy conflicting with the law of the State in which the Policy is issued shall be construed as amended to conform with such law.

K. No condition or provision of this Policy shall be waived or altered nor insurance thereunder extended except by written or printed Endorsement on or Rider attached to the Policy and bearing the signature of an executive officer of the Company nor shall notice to any agent or knowledge possessed by such agent or by any other person be held to effect a waiver or change in any part of this Policy. No person shall be deemed an agent of the Company unless such person is authorized in writing by an executive officer of the Company under its seal. The personal pronoun herein used to refer to Assured shall apply regardless of number or gender.

L. The Statements herein contained are on acceptance of this Policy warranted by Assured to be true excepting such only as are declared therein to be matters of estimate and this Policy is for Policy Period more than one year the following computation shall apply:

Three Year Period, Gross Premium, \$..... (10% discount for Period) Net Total Premium \$.....

Payable (1) in advance, \$....., (2) 1st Anniversary, \$....., (3) 2nd Anniversary, \$.....

The Minimum Premium for this Policy shall be, \$.....

9. The estimated compensation set forth in Statement 8 covers the compensation of all employees, including any person or persons who superintend, engaged in the trade or business described in said statement as carried on by Assured at the

locations given therein, including the compensation for regular time, over-time, piece-work, allowances, whether paid in cash, board, store certificates, merchandise, credits, or in any other way. None of the special features therein mentioned are to be covered unless the estimated average number of employees engaged, the estimated compensation, and the premium rate are stated. Death or bodily injuries caused by any superintendent or other employee whose compensation is not included in the foregoing estimates, shall not be covered by the Policy; but this shall not apply to drivers employed by Assured, who are specifically enumerated in any concurrent Teams Policy carried by Assured in this Company, while such drivers are not driving or using teams, not to Assured if an individual or co-partnership, nor to the President, Vice-President, Secretary or Treasurer, if Assured is a corporation.

10. Pursuant to the above Statement the compensation of the following employees is excluded from the estimate; President, Vice-President, Secretary, Treasurer and Clerical force.

11. Insurance on this risk has not been declined or cancelled by any Company, excepting.....No exceptions.

12. The signature to the Application for this Policy is accepted by the Assured as his signature.

NORTHWEST LUMBER CO.,

By L. G. HORTON, Secy-Treas.

Assured.

Condition "G" of the within policy is hereby amended by elimination of the words: "Except that he may provide at the time of the accident and at the cost of the Company such immediate surgical relief as is then imperative."

This endorsement to take effect at noon of the first day of July, 1908. This endorsement when countersigned by a duly authorized agent of the Company and attached to Policy No. 0101 issued to Northwest Lumber Company of Seattle, Wn., shall be valid and shall form part of said Policy.

THE EMPIRE STATE SURETY COMPANY,

Countersigned at Seattle, Wn., this 27th day of June, 1908, by J. A. Kennard, Authorized Agent, W. M. Tomlins, Jr.

President.

Approved by.....
 Ent. on Register.....
 Ent. on Acct. Books.....

IN WITNESS WHEREOF, the EMPIRE STATE SURETY COMPANY has caused this Policy to be signed by its President and Secretary, at New York City, N. Y., but the same shall not be binding upon the Company unless countersigned by a duly authorized representative of the Company.

W. M. TOMLINS, Jr.,
 President.

DANIEL STEWART,
 Secretary.

Countersigned at Seattle, this 27th day of June, 1908.

J. A. KENNARD,

Issued in consideration of such warranties and of the payment of premium as provided for in the Schedule of Statements.

Countersigned by

J. A. KENNARD,

W. M. TOMLINS, Jr.,
 General Agent. President.

SCHEDULE OF STATEMENTS

1. Name of Assured, NORTHWEST LUMBER COMPANY,
 Address (office) 602 Bailey Bldg., Seattle, Wn.
 Individual, co-partnership, corporation or estate? Corporation.
2. The Policy period shall begin July 1st, 1908, and end July 1st, 1909, at 12 o'clock noon, standard time, at Assured's address, as to each of said dates.
3. The Company's limit of liability, whether insuring only one or more than one interest, under the Policy (exclusive of expenses referred to in Clause A of the Policy) for death or injury of one person shall be \$5000., and subject to that limit for each person. The Company's total liability (exclusive of said expenses) on account of any one accident causing death or injury of more than one person shall not exceed \$10,000.)
4. Assured conducts no similar business operations at any other location than stated in Declaration 8, excepting only.....No exceptions.

5. No part of the work is sub-contracted, directly or indirectly, excepting only.....Logging is sometimes done under contract form but all moneys paid a/c thereof are included in payroll.
6. The power employed is steam. No chemicals are used, excepting.....No exceptions. No explosives are used excepting Blasting on logging roads and clearing land and right-of-way. There are no elevators or hoists so constructed that they cannot be started, stopped and controlled by a person riding on same, excepting.....No Exceptions.
7. The total compensation of the employees to be covered by this Policy, for one year ending June 30th, 1908, was \$.....

8. Places where work is done	: Manual Classification of Work
	: to be insured (Use Description as worded in Manual)
Kerriston, Wn.	:
	: Logging Railroad
Estimated Average Number of Employees 16 years of age or over	: Logging Camp
	: Estimated Total Wages and other compensation for 12 months

	Rate per \$100 of Wages	Estimated Premiums
Logging Railroad.....\$3600.	2.70	97.20
Logging Camp\$18000.	1.35	243.00

- Special features not included in above estimates : Persons 14 to 16 years of age....
- : Wrecking or demolition of any structure.
- : Railroads, Switches, or side-tracks, operated other than by hand power.
- : Drivers not enumerated in current Team Policy, and Drivers' Helpers.

Minimum Premium for one year, \$50..... Deposit Premium
for one month \$..... Advance Premium

That on the 4th day of November, 1908, one John Hall, an employee of the plaintiff who came within the terms of the policy, working in one of the three logging and loading camps maintained by the plaintiff, at or near Kerriston, Washington, was injured by having his leg broken, and that he was there working under Dan Williams, a foreman of the gang or camp where the said Hall was injured; all being foreigners and speaking the English language very little; that the Company maintained three logging camps for getting out logs and loading the same on cars, a general saw mill plant where it operated its mills, or did its sawing, and a logging railroad for carrying lumber and logs, and that over all was a superintendent named John McRea, who had general charge and control of all the affairs at Kerriston, Washington, and general affairs of the plaintiff was in charge of its general secretary and treasurer, L. G. Horton, at Seattle.

That about eleven months after the injury, the said John Hall brought an action for damages in the Superior Court of King County, Washington, which was prosecuted, and a judgment recovered in the sum of \$10,000., which cause was afterwards appealed to the Supreme Court of the State, and there affirmed, and thereafter with the costs paid by the plaintiff.

That the plaintiff's superintendent aforesaid, and the Secretary, testified that until suit was brought by said Hall they had no personal knowledge of the occurrence of the accident whereby the said John Hall was injured, the other officers of the company having no knowledge of the affair, and made no report thereof to the defendant, or any agent thereof, and gave no notice of the accident or anything pertaining thereto, until the service of the summons and complaint in the case brought by Hall in said Superior Court on the 26th day of October, 1909, whereupon notice was at once given to Defendant and when the notice was given the defendant reserved its rights in an agreement made between the parties to this action regularly introduced in evidence as Exhibit, which agreement is as follows:

Nov. 15th, 1909.

Northwest Lumber Company,
White Building,
Seattle, Wash.

Gentlemen:—

In regard to the case of Hall against you pending in the Superior Court of this County on summons and complaint served Oct. 26th last, I beg to say that in accordance with our understanding I will defend this action as the representative of the Empire State Surety Company, but with the understanding that it will not prejudice your rights, or that of the Surety Company, respecting the matter as to whether notice of this accident has or has not been given. The matter of notice referred to in the Policy which you hold insuring you will be a matter of future adjustment, and without in any way affecting my appearance as attorney in the case or your consenting to my appearance as your attorney in this case and upon the record.

If this is agreeable to you, please indicate it by your approval hereon, and that will be satisfactory to all parties.

Yours very truly,

(Signed) JOHN P. HARTMAN.

The foregoing is read and approved the date first herein stated.

(Signed) NORTHWEST LUMBER CO.,

G. B. Barclay, Pres.

and the said agreement had not been thereafter altered or amended at any time; that after the accident to the said John Hall, whose leg was broken, he was taken in charge by the said foreman, Dan Williams, and from there conveyed first upon the logging road to a railroad, and thence to a hospital in Seattle, about forty miles distant from the place where the accident occurred, and all being in King County, Washington, in which hospital he remained about eleven months.

Thereupon the defendant offered testimony tending to show that it had no knowledge or information in any way of the accident to John Hall, occurring November 4th, 1909, until after the service of summons and complaint in his case as aforesaid; that because it did not have immediate notice of the accident

it was greatly prejudiced and damaged, in that it could not prepare for the trial of the case, as it was bound to under the terms of the policy if notice was immediately given, that it was unable to prepare to defend and defend the case and to obtain testimony, and that prejudice resulted against the defense because of the want of notice, all of which the witness claimed was prejudicial to the interests of the defendant, and all of which the witness claimed was caused by want of compliance with the terms of the policy insuring against loss, for which this suit is brought, and upon cross examination plaintiff showed that all eye witnesses were at the trial for Hall save one, whose whereabouts was unknown, which trial was held in the state court of Washington about April 11th, 1910, which witnesses were all called for the said Hall.

Hereupon and after the testimony was all submitted, and before the argument of counsel to the jury, or the instruction of the jury by the Court, counsel for defendant challenged the sufficiency of the testimony as offered to warrant submitting the case to the jury, and thereupon moved the Court to take the case from the jury, and direct a verdict of non-suit, and dismissal, in favor of the defendant, because no cause of action was proven in favor of the plaintiff and against the defendant, which motion was denied and overruled by the Court, and an exception thereupon taken by the defendant, and allowed by the Court.

EXCEPTION II.

That the Court instructed the jury as follows:

"The jury, therefore, are required to determine from the consideration of the evidence in the case whether that condition of the policy has been met by the plaintiff. That notice was given is undoubtedly true as shown by the evidence. The question is, was it given at once, and that is a question for the jury to determine from a consideration of all the circumstances in the case whether the plaintiff acquired its rights under this policy by giving prompt notice of the happening of the injury. The degree of promptness, of course, depends upon all the circumstances of the case. When did the accident happen and when did the plaintiff in the case become informed of it so as to be in a position to give notice, because it could not

give the notice until it did know it. But in Law it would be presumed to know what would have been known in the exercise of intelligence and vigilance such as business men conducting important business affairs usually do have when they are attending to their business properly, when they have efficiency to their service. If that notice was not given at once, as I have defined this phrase, the plaintiff has failed to make out a case and your verdict should be for the defendant.

After the jury retired, the defendant objected to the instructions, as copied immediately above, for the reason that the same did not state the law applicable to the proven and undisputed facts, and excepted to the same, and thereupon the Court allowed an exception to the defendant.

EXCEPTION III.

That thereafter and after a verdict was returned for the plaintiff and against the defendant, the defendant made its motion for judgment notwithstanding the verdict, and in the alternative, if the same should be denied, then its motion for new trial, upon the grounds as follows:

MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT, OR FOR NEW TRIAL

Comes now the above named defendant, Empire State Surety Company, by John P. Hartman, its attorney, and respectfully moves the Court for a judgment of dismissal, and for costs against the plaintiff, notwithstanding the verdict of the jury in said cause.

This motion is based upon the evidence and the record in said case.

And the said defendant, in the event its motion for judgment notwithstanding the verdict above made is not granted, and without waiving any rights thereunder, comes now and excepts to the verdict rendered by the jury, and moves the Court to set the same aside and grant a new trial upon the grounds as follows:

1. Excessive damages, appearing to have been given under the influence of passion and prejudice.

2. Error in the assessment of the amount of recovery, same being too large.

3. Insufficiency of the evidence to justify the verdict, in this respect, that the plaintiff failed by a preponderance of the evidence to show that it had complied with the terms of the policy as pleaded and set forth in its complaint, wherein it failed to give any notice of the accident within the time as provided by the policy, and in all respects failed to comply with the terms of the policy as to giving notice of the accident as required, and of assisting the defendant in the defense of the case in the Superior Court of King County, Washington, wherein John Hall was plaintiff, and the plaintiff here was defendant, and of procuring the attendance of witnesses as required by the terms of the policy, and that John Hall was in the employ of the plaintiff.

4. Errors in Law occurring at the trial and duly excepted to at the time by the defendant, in this respect, viz., the Court's refusal and failure to grant its motion for a directed verdict and dismissal of the cause, which was duly made, argued, and submitted, overruled, and an exception taken.

which were thereafter fully argued by counsel before the Court, and after argument, the same, and each thereof, were overruled and denied by the Court, to which ruling the defendant excepted, and an exception was allowed by the Court, and after the whole case had been fully submitted to the Court and a verdict rendered, judgment was rendered as follows:

This cause came on for trial on the 4th day of June, 1912, the plaintiff appearing by its Attorneys, Messrs. Byers & Byers and Elmer E. Todd, Esq., and the defendant appearing by its Attorney, J. P. Hartman, Esq., and a jury was duly impaneled and sworn, and evidence was introduced on behalf of the defendant, and the jury having heard the arguments of counsel and the instructions of the Court, on the 7th day of June, 1912, returned a verdict in favor of the plaintiff in the sum of Five Thousand Seven Hundred and Seventy-eight (\$5,778.00) Dollars;

WHEREFORE by virtue of the law and the aforesaid premises

IT IS ORDERED, ADJUDGED and DECREED that the

plaintiff do have and recover from the Defendant the sum of Five Thousand Seven Hundred and Seventy-eight (\$5,778.00) Dollars, with interest at the rate of six per cent (6%) per annum from the 7th day of June, 1912, with its costs and disbursements herein taxed in the sum of

Done this 11th day of July, 1912.

(Signed) C. H. HANFORD,

Judge.

ORDER SETTLING BILL OF EXCEPTIONS

Now on this 24th day of July, 1912, the above cause coming on for hearing on the application of the defendant to settle the bill of exceptions in said cause, defendant appearing by John P. Hartman, its attorney, and the plaintiff by Byers & Byers and Elmer E. Todd, its attorneys, and it appearing to the Court that the defendant's proposed bill of exceptions was duly served on the attorneys for the plaintiff, within the time provided by law, and the time for settling said bill of exceptions has not expired, and it further appearing to the Court, that said bill of exceptions contains all the material facts as to whether notice was given under the terms of the policy occurring at the trial of said cause, together with the exceptions thereto, and all the material matters and things occurring upon the trial upon said point.

NOW THEREFORE, IT IS ORDERED, that the foregoing bill of exceptions, be and the same is hereby settled as a true bill of exceptions in said cause, and the same is hereby certified accordingly by the undersigned judge of this Court, who presided at the trial of said cause, as a true, full and correct bill of exceptions, and the Clerk is hereby ordered to file the same as a record in said cause and transmit the same to the Honorable Circuit Court of Appeals for the Ninth Circuit.

C. H. HANFORD,

PETITION FOR WRIT OF ERROR AND SUPERSEDEAS.

The Empire State Surety Company, a corporation, the defendant in the above entitled cause, feeling itself aggrieved by the judgment made and entered herein on the 11th day of July,

1912, in favor of the plaintiff and against this defendant, for Five thousand seven hundred seventy-eight (\$5,778.00) Dollars, interest, and costs of suit, taxed at eighty-five and 45/100 Dollars (\$85.45), and petitions said Court for an order allowing said defendant to prosecute a writ of error to the Honorable, the United States Circuit Court of Appeals for the Ninth Circuit, under and according to the laws of the United States in that behalf made and provided, and also that an order be made fixing the amount of security which the said defendant shall give and furnish upon said writ of error, and that upon the giving of such security all further proceedings in this court be suspended and stayed until the determination of the said writ of error by the United States Circuit Court of Appeals for the Ninth Circuit.

And your petitioner will ever pray.

JOHN P. HARTMAN,
Attorney for Defendant.

ORDER ALLOWING WRIT OF ERROR AND FIXING AMOUNT OF SUPERSEDEAS BOND.

This cause coming on to be heard upon the petition of defendant for a writ of error and supersedeas herein, and together with the assignment of errors filed within due time; and also praying for an order fixing the amount of security which the said defendant shall give and furnish upon said writ of error, and that such other and further proceedings may be had as may be proper in the premises:

Now, therefore, it is, by the court, ordered, that the bond on writ of error be, and the same is hereby fixed at the sum of Ten Thousand Dollars, conditioned and to the effect that the said defendant shall prosecute its writ of error to effect and shall answer all damages and costs that may be awarded against it if it fails to make its plea good, said bond and security to be approved by the above entitled Court or Judge presiding therein, and upon the filing of such bond, duly approved by the Court, all further proceedings in said cause shall be suspended and stayed until the determination thereof in the Circuit Court of Appeals.

Done in open court, this 24th day of July, 1912.

C. H. HANFORD,

Judge.

SUPERSEDEAS AND COST BOND ON WRIT OF ERROR.

Know all men by these presents, that we, The Empire State Surety Company, a corporation, defendant above named, as principal, and National Surety Company, a corporation formed under the laws of the State of New York duly authorized to carry on a surety business in the State of Washington, as surety, are held and firmly bound unto Northwest Lumber Company, a corporation, the plaintiff, in the full and just sum of Ten Thousand Dollars, to be paid to the said Northwest Lumber Company, a corporation, its attorneys, successors or assigns, to which payment well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally, firmly by these presents.

Witness our hands and seals this 24th day of July, 1912.

Whereas, lately at a session of the District Court of the United States for the Western District of Washington, Northern Division, in a suit pending in said court between the Northwest Lumber Company, a corporation, as plaintiff, and Empire State Surety Company, a corporation, as defendant, a final judgment was rendered against the said defendant and in favor of the plaintiff, in the sum of Five thousand seven hundred seventy-eight (\$5,778.00 Dollars and costs of suit, and the said defendant having obtained from the said Court a writ of error to reverse the judgment aforesaid, and having filed a copy thereof in the Clerk's office of said Court, and a citation directed to the said Northwest Lumber Company, a corporation, is about to be issued citing and admonishing it to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, California.

Now, the condition of the above obligation is such that if the said The Empire State Surety Company, a corporation, the defendant above named, shall prosecute its writ of error to effect, and shall answer all damages and costs that may be awarded against it if it fails to make its plea good, then the

above obligation is to be void; otherwise to remain in full force and virtue.

THE EMPIRE STATE SURETY COMPANY,
(Seal) By John P. Hartman,
Its Agent and Atty.
NATIONAL SURETY COMPANY,
By John W. Roberts,
(Seal) Resident Vice-President.
Attest: Geo. W. Allen,
Resident Assistant Secretary.

The foregoing bond is hereby approved, this 24th day of July, 1912.

C. H. HANFORD,
Judge.

ASSIGNMENT OF ERRORS.

Comes now the Empire State Surety Company, a corporation, plaintiff in error herein, by its attorney, John P. Hartman, and in connection with its petition for writ of error herein, based upon the bill of exceptions in this cause, makes the following assignment of errors, and particularly specifies the following as the errors upon which it will rely, and which occurred upon the trial of said cause, to-wit:

I.

That the District Court of the United States for the Western District of Washington erred in refusing to grant the motion of plaintiff in error made at the close of the trial and before the cause was submitted to the jury for a directed verdict, and for non-suit and dismissal, to which ruling plaintiff in error excepted at the time and exception was allowed.

II.

That the said Court erred in giving its instruction to the jury as follows:

"The jury, therefore, are required to determine from the consideration of the evidence in the case whether that condition of the policy has been met by the plaintiff. That notice was given is undoubtedly true as shown by the evidence. The ques-

tion is, was it given at once, and that is a question for the jury to determine from a consideration of all the circumstances in the case whether the plaintiff acquired its rights under this policy by giving prompt notice of the happening of the injury. The degree of promptness, of course, depends upon all the circumstances of the case. When did the accident happen and when did the plaintiff in the case become informed of it so as to be in a position to give notice, because it could not give the notice until it did know it. But in law it would be presumed to know what would have been known in the exercise of intelligence and vigilance such as business men conducting important business affairs usually do have when they are attending to their business properly, when they have efficiency in their service. If that notice was not given at once, as I have defined this phrase, the plaintiff has failed to make out a case and your verdict should be for the defendant," which, after given, and the jury retired, was excepted to by the defendant as follows:

"The defendant excepts to that part of the instruction given by the court wherein the court seeks to define the rule governing the giving of notice under the terms of the policy by the plaintiff to the defendant, and thereupon the court allowed the exception made by plaintiff in error.

III.

That the said court erred in overruling plaintiff in error's motion for judgment on its behalf notwithstanding the verdict, and its motion for a new trial, on the grounds therein stated, to which ruling plaintiff in error excepted, and an exception was allowed.

IV.

That the said Court erred in rendering judgment against plaintiff in error, and in favor of defendant in error, to which exception was taken by plaintiff in error, and exception allowed.

WHEREFORE, the said Empire State Surety Company, a corporation, plaintiff in error herein, prays that the judgment rendered herein may be reversed and ordered dismissed and the said court directed to make an order vacating and setting

aside the same, that a new trial may be granted, and such proceedings had as shall be in conformity with right and law.

JOHN P. HARTMAN,
Attorney for Plaintiff in Error.

PRAECIPE FOR TRANSCRIPT.

To the Clerk of the Said Court:

You will please make transcript of record for the printer, for writ of error in this cause, and include therein in accordance with the stipulation filed herewith between counsel, the following: The complaint, the answer, the reply, the verdict, the judgment, the order extending time to file bill of exceptions, made on the 10th day of July, 1912, the bill of exceptions, petition for writ of error and supersedeas, order allowing writ of error, supersedeas and cost bond, assignment of errors, the writ of error and citation, omitting therefrom in printing the record the designation of the Court, etc., as shown by the stipulation.

Copies of the above documents are tendered herewith for your use, in accordance with the rules.

Dated this 1st day of August, 1912.

JOHN P. HARTMAN,
Attorney for Defendant.

STIPULATION.

IT IS STIPULATED AND AGREED, between the parties to this cause, by their attorneys of record, that the following papers shall be included in the transcript on writ of error to the Circuit Court of Appeals, to-wit: the complaint, the answer, the reply, the verdict, the judgment, order extending time to file bill of exceptions, bill of exceptions, petition for writ of error and supersedeas, order allowing writ of error, supersedeas and cost bond, assignment of errors, the writ of error, and citation, and that all other files may be omitted, and that the clerk of the above entitled court in printing the record may

omit the designation of the court, the title of the cause, verification, and endorsements except on the first page.

Dated, August 1st, 1912.

BYERS & BYERS and
ELMER E. TODD,

Attorneys for Plaintiff.

JOHN P. HARTMAN,

Attorney for Defendant.

United States of America,

Western District of Washington.—ss.

I, A. W. Engle, Clerk of the District Court of the United States, for the Western District of Washington, do hereby certify the foregoing 34 printed pages numbered from 1 to 34, inclusive, to be a full, true and correct copy of the record and proceedings in the above and foregoing entitled cause as is called for by the Praecipe of the Attorney for Defendant and Plaintiff in Error, as the same remain of record and on file in the office of the Clerk of the said Court, and that the same constitutes the return to the Writ of Error received and filed in the office of the Clerk of the said Court on July 25, 1912.

I further certify that I annex hereto and herewith transmit the original Writ of Error and Citation in said cause.

I further certify that the cost of preparing and certifying the foregoing return to Writ of Error is the sum of \$43.20 and that the said sum has been paid to me by John P. Hartman, Esq., Attorney for Defendant and Plaintiff in Error.

IN TESTIMONY WHEREOF I have hereunto set my hand and affixed the seal of said District Court, at Seattle, in said District, this 28th day of August, 1912.

(Seal)

A. W. ENGLE, Clerk.

J. A. O'Brien Secy

WRIT OF ERROR.

United States of America
Ninth Circuit.—ss.

*The President of the United States of America, to the Honorable
the Judges of the District Court of the United States,
for the Western District of Washington, Northern Di-
vision:*

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court before you, or some of you, between Northwest Lumber Company, a corporation, defendant in error herein, and Empire State Surety Company, a corporation, plaintiff in error herein, a manifest error hath happened to the great damage of the said Empire State Surety Company, a corporation, as by its complaint appears.

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid, in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same to the United States Circuit Court of Appeals, for the Ninth Circuit, together with this Writ, so that you have the same at the city of San Francisco, in the State of California, within thirty days from the date of this writ, to-wit, on the 24th day of August, A. D. 1912, in the said Court of Appeals then and there to be held, that the record and proceedings aforesaid, being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States, should be done.

WITNESS THE HONORABLE CORNELIUS H. HANFORD, United States District Judge, presiding in the Western District of Washington, this 25th day of July, A. D. 1912, and of our Independence the One hundred thirty-seventh.

(Seal)

A. W. ENGLE,

Clerk of the United States District Court for the Western District of Washington, Northern Division.

By F. A. SIMPKINS, Deputy.

The foregoing writ of error is hereby allowed this 25th day of July, 1912.

C. H. HANFORD,
United States District Judge.

We hereby acknowledge service of the foregoing writ of error and the receipt of a true copy thereof this 25th day of July, 1912.

ELMER E. TODD,
Attorney for Defendant in Error.

CITATION.

The President of the United State of America, to Northwest Lumber Company, a corporation, Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City of San Francisco, State of California, within thirty days from the date of this writ, to-wit, on the 24th day of August, 1912, pursuant to a writ of error filed in the Clerk's office of the District Court of the United States for the Western District of Washington, Northern Division, wherein the Empire State Surety Company, a corporation, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf

Witness the Honorable Cornelius H. Hanford, United States District Judge presiding in the Western District of Washington, this 25th day of July, A. D. 1912, and of our Independence the One Hundred Thirty-Seventh.

C. H. HANFORD,
Judge of the United States District Court, for said District of Washington.
(Seal)

Due and personal service of the above citation and receipt of a copy thereof is hereby admitted this 25th day of July, 1912.

ELMER E. TODD,
Attorney for Northwest Lumber Company.

IN THE
UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH DISTRICT

EMPIRE STATE SURETY COM-
PANY,

Plaintiff in Error,

vs.

NORTHWEST LUMBER COM-
PANY,

Defendant in Error.

No. 2184

Upon Writ of Error to the United States Circuit Court
for the Western District of Washing-
ton, Northern Division.

BRIEF OF PLAINTIFF IN ERROR

JOHN P. HARTMAN,
Attorney for Plaintiff in Error.

Alaska Printing Co., Alaska Bldg., Seattle.

FILED

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IN THE
UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH DISTRICT

EMPIRE STATE SURETY COM-
PANY,

Plaintiff in Error,

vs.

NORTHWEST LUMBER COM-
PANY,

Defendant in Error.

No.....

Upon Writ of Error to the United States Circuit Court
for the Western District of Washing-
ton, Northern Division.

BRIEF OF PLAINTIFF IN ERROR

JOHN P. HARTMAN,
Attorney for Plaintiff in Error.

IN THE
UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH DISTRICT

EMPIRE STATE SURETY COM- PANY,	}	No.
<i>Plaintiff in Error,</i>		
<i>vs.</i>		
NORTHWEST LUMBER COM- PANY,		
<i>Defendant in Error.</i>		

**Upon Writ of Error to the United States Circuit Court
for the Western District of Washing-
ton, Northern Division.**

BRIEF OF PLAINTIFF IN ERROR

I.

STATEMENT OF THE CASE.

Defendant in error, during and after the year 1908, was engaged in logging, operating a logging railway, and manufacturing the raw product into

lumber, all in King County, Washington, and to protect itself from liability on account of injury to its employes obtained a policy of insurance from the plaintiff in error about the 27th day of June, 1908 (Tr. p. 12, *et seq.*). One logging and loading camp was on the 4th day of November, 1908, composed of several men in charge of Dan Williams as foreman, and on said date one John Hall was severely injured, having his leg broken, in the regular line of work (Tr. p. 21). Over this general work of three logging camps, a saw mill and a railway, John McRea was superintendent, who had general charge and control of the affairs at the mill, logging plants and railway, and the rest of the affairs were in charge of L. G. Horton, secretary and treasurer (Tr. p. 21). About eleven months after the injury, John Hall brought a suit in the Superior Court of Washington to recover damages for the injury, and was given by a jury \$10,000.00, which was afterwards affirmed by the Supreme Court of the state (Tr. p. 21). The Mill Company's secretary and superintendent testified that he had no personal knowledge of the injury to Hall until the suit was brought, and on said day, to-wit, October 26th, 1909, the secretary gave the summons and complaint to the surety company, which received the same, and

thereupon a written agreement was entered into by which all rights were reserved for want of giving notice (Tr. p. 22), and that the agreement remained in full force and effect ever since. Dan Williams conveyed the said Hall over the logging railway and on a regular railroad to a hospital in Seattle, and had charge of him in that way while acting as foreman (Tr. p. 22).

The plaintiff in error, the surety company, had no notice of the accident in any way until the copy of summons and complaint served upon the mill company was sent to the surety company, and that for want of notice it was greatly prejudiced and damaged, and that the terms of the policy were violated to its damage; that it was not prepared to and could not defend the case as it would have done had notice been given according to the terms of the policy, and that it was greatly prejudiced, as shown (Tr. pp. 22-23).

At the close of the testimony, a motion for a directed verdict in favor of the defendant was submitted, and further, to have the case taken from the jury, which was denied, and over-ruled by the court, and an exception taken (Tr. p. 23).

This seems a sufficient statement of the case,

for it is very brief in the transcript, except such as shall appear in the argument hereinafter set forth.

II.

SPECIFICATIONS OF ERRORS.

1. The court erred in refusing to grant the motion of plaintiff in error for a directed verdict of non-suit and dismissal, to which ruling plaintiff in error excepted at the time, and an exception was allowed.

2. The court erred in giving its instruction to the jury as follows:

“The jury, therefore, are required to determine from the consideration of the evidence in the case whether that condition of the policy has been met by the plaintiff. That notice was given is undoubtedly true as shown by the evidence. The question is, was it given at once, and that is a question for the jury to determine from a consideration of all the circumstances in the case, whether the plaintiff acquired its rights under this policy by giving prompt notice of the happening of the injury. The degree of promptness, of course, depends upon all the circumstances of the case. When did the accident happen and when did the plaintiff in the case become informed of it so as to be in a position to give notice, because it could not give notice until it did know it. But in law it would be presumed to know what would have been known in the exercise of intelligence and vigilance such as business men conducting important business affairs usually do have when they are attending to their business properly,

when they have efficiency to their service. If that notice was not given at once, as I have defined this phrase, the plaintiff has failed to make out a case and your verdict should be for the defendant.” (Tr. p. 23).

Which after given and the jury retired was excepted to by the defendant, for the reason that the same did not state the law applicable to the proven and undisputed facts, and thereupon the court allowed an exception to the defendant.

3. The court erred in overruling plaintiff in error’s motion for a judgment notwithstanding the verdict, and in the alternative its motion for a new trial, to which ruling an exception was allowed by the court upon the request of the defendant (Tr. p. 25).

III.

BRIEF OF THE ARGUMENT.

1. In presenting this brief of the argument, we shall consider errors 1 and 3 together, because under the facts and the law but one question is presented under both specifications, and they therefore should be jointly presented.

In this brief we think there will be less confusion if we refer to the plaintiff in error as the

“insurance company” and the defendant in error as the “mill company.”

In the year 1908, the mill company was engaged in a large business, which consisted chiefly of running three complete logging camps, in cutting and assembling saw logs upon the timber lands of the mill company, and, when assembled, upon the mill company's own railway were carried upon that railway from the three several logging camps to the saw mill, where the raw product was manufactured into merchantable timber.

Mr. Horton, whose office was in the White Building, in Seattle, as secretary and treasurer, had general control over all affairs. Mr. McRea, who lived at the mill, was the superintendent, and had general control in the field. The different divisions of the work under his control were managed or controlled by foremen.

In order to protect itself against paying losses on account of injuries to its employes, the mill company in the year 1908 procured a policy of insurance, which is set forth in full in the transcript, to cover the contingency. Among others covered by this policy was one John Hall, a foreigner who spoke very little English, and who worked in one of

the logging camps under Dan Williams, the foreman.

On November 4th, 1908, John Hall, while assisting in loading logs upon the railway car where they were being assembled from the woods, suffered a serious fracture of his leg, and immediately the work stopped, and the foreman Dan Williams helped take Hall upon a special car or train upon the logging road to the railroad near by, upon which he was conveyed in charge of Williams to the hospital in Seattle.

Almost a year later Hall brought a suit in the Superior Court at Seattle for damages, and recovered \$10,000.00, from which an appeal was taken and the case affirmed, and the company paid the amount. No notice of any kind or character whatsoever, as shown by the written agreement of the mill company and the insurance company, was given to the insurance company of this accident, until a day or so after the summons and complaint was served upon the mill company.

The provision of the policy relative to notice to be given under paragraph F (Tr. p. 16) is as follows:

“F. Assured on the occurrence of an accident

in respect of which claim can be made under this policy shall at once give written notice thereof to the company at New York or to the company's duly authorized agent. Assured shall give like notice with full particulars of any claim made on account of an accident so reported, and if steps are taken to enforce such claim by suit or otherwise assured shall also deliver to the company all papers and information pertaining thereto immediately upon receipt thereof, whereupon the company shall at its own cost undertake on behalf and in the name of the assured the settlement of such claim or the defense of such suit and the prosecution of any appeal which it may undertake."

The notice to be so given is of great material importance to the company, and the parties by their contract have agreed that it is material, and the fact of this materiality is further strengthened by the provision of the policy numbered G, providing that "assured shall when requested by the company aid in securing information or evidence and the attendance of witnesses, and in effecting settlements and in the prosecution of appeals," thus stating the reason for the requirement of prompt notice.

The question, therefore, presented under this heading of the argument is, was the notice given in the manner aforesaid sufficient under the policy to bind the insurance company and make it liable to the mill company. Dan Williams, the foreman, knew of the accident. The Superintendent and

the secretary and treasurer both testified that they never heard of the case or knew anything about it until the time of the commencement of suit. At that time all rights were reserved. The undisputed testimony of the insurance company is that it was damaged for want of notice, because the witnesses were scattered, it could not prepare for the suit, it could not protect its interests, as it otherwise could have done, and because of the fact was damaged and should be released.

Under the authorities hereinafter cited, and using common sense, and being guided by ordinary business methods, we are convinced that the non-action of the mill company in failing to give any notice of the accident during the twelve months absolutely released the insurance company from all liability.

In order that the mill company might recover at any time it was not only required to give notice of an accident, but it likewise must at all times render assistance in defending the action or procuring settlements, etc., that is, we see the reason for this immediate notice. The mill company's foreman knew of the accident, and that is sufficient.

If we should have to abide by the rule that un-

doubtedly will be contended for by the mill company's learned counsel, to the effect that notice of the accident to the superintendent or secretary and treasurer only can bind, and other notice of an accident would not be binding upon the mill company, then all that the insured has to do is to lock up its superintendent or its secretary and treasurer, or keep them away from the place of operation, and it can run its business in any old loose way, and always bind the insurance company, and violate the plain terms and conditions of its contract.

We now desire to call the court's attention to the following cases, to-wit: The case of

California Sav. Bank vs. American Surety Co., 87 Fed. 118,

where the policy provided that

“The company shall be notified in writing at its office in the City of New York of any act on the part of the employe which may involve a loss for which the company is responsible hereunder as soon as practicable after the occurrence of such act shall have come to the knowledge of the employer.”

The court held that the notice to be given as prescribed in the policy was a condition precedent, and, unless given, no cause of action accrued, and on page 124 of the opinion states:

“The allegations of the complaint, that the defendant was, in the month of May, 1892, fully advised and informed of the breaches of the bond, and the loss resulting therefrom, do not, in my opinion, excuse plaintiff’s failure to give the prescribed written notice of the fraudulent acts of the employe, and said failure is such non-performance of the contract on the part of the plaintiff as to defeat its recovery.”

In the case of

Frank Parmelee Co. vs. Aetna Life Ins. Co.,
166 Fed. 741,

the question was as to the time of sending a copy of summons to the insurance company as soon as service was made on the company, and the court found that due diligence in informing the company of the accident had been exercised by the insured, and on page 744 the court states:

“For defendant in error was put in full information of all the facts transpiring up to that time—had all the data upon which to base its judgment as to what defense might be made to the Wheelock action and how the defense could be conducted.”

In this quotation and in the whole opinion, the court brings out the point that the material fact to be communicated to the insurance company is the fact of the accident happening so that the insurance company can proceed as it sees proper

under the evidence obtainable at the time of the accident.

This case last cited is sometimes referred to as one sustaining the insured, but we want to emphasize again the fact that the court in considering policies of this kind at all times hold against the insured when it is seeking to escape because of a mere technical defect, like where it has all the information enabling it to defend, and did not get in time, for instance, a copy of a paper served; but where a substantial right is jeopardized and a plain provision of the policy is being violated, and justice and equity would be endangered, then the surety company prevails, that is, not only the facts governing, but the equity of the situation is considered. This case therefore sustains our position.

In the case of

Hope Spoke Co. vs. Maryland Casualty Co.,
143 S. W. 85,

the court rests its decision on the equity of the case, because the insurance company was notified within sufficient time to make a complete investigation of the case—notice having been received by the company within about two months from the time of the accident. There was also

the fact in this case, that the insured notified the brokers who were acting as agents for the insurer, and who had previously acted as agents for the insurer in forwarding notice, but it was through the carelessness of these brokers that immediate notice was not given the insurer. The court on page 88 says:

“The facts of this case illustrate the justness of the conclusion we reach on the question. Appellee received notice of the accident in time to make a full investigation and to investigate to its satisfaction. It is not claimed that it suffered loss or injury by reason of not having received the notice earlier. The defense is purely technical and without any substantial merit.”

This case was relied upon in the court below by the mill company as sustaining its position to the effect that under the circumstances it was excused. We do not so read the case, particularly taken in connection with the large number of authorities going more into detail and extending the doctrine. This Arkansas case finds that the insurance company had plenty of time in which to examine and make its defense, that is, the accident occurred on December 22nd, the first notice was sent to the wrong parties, but a right notice did go forward on the 2nd of January, and on the 24th of January, the agent having been sick, fully informed himself,

and the claim agent was immediately dispatched to investigate. We submit that there is a great difference between twelve months and one month, for in one month witnesses would not become scattered as a rule, but in twelve months, as shown by the proof in this case, they do.

The general rule is set out in

Woolverton vs. Fidelity & C. Co., 190 N. Y. 41, 82 N. E. 745, and with note in 16 L. R. A. 400 (N. S.),

is:

“The condition of the policy is to be interpreted as meaning after the insured has become apprised of the accident, *provided, however, he exercises reasonable diligence to acquire information.* There is therefore cast upon him the duty of so regulating his business that he may be apprised with reasonable celerity of any accident that may occur in its conduct.”

In the case at bar nothing has been shown to approach common business methods, much less diligence. The corporation pleads ignorance of an accident which demoralized one of the principal adjuncts of its business for considerable time, and not only did the foreman of the crew accompany the victim of the accident, but took with him a special logging engine outfit. The mill company thus had notice, but let us admit it had not in this way, there-

by its negligent means of conducting its affairs it had lawful notice and is now estopped to claim want of notice. Yet, with one of its employes mutilated and nearly killed, defendant in error here tries to justify its delay in giving notice for eleven months, and even after the camp was disbanded, because of ignorance of the accident.

To permit the plea of ignorance of the accident and justify the failure to give notice under such a plea without the least showing of any excuse whatever for such ignorance, would be allowing a negligent party to take advantage of his own wrong.

The court will bear in mind that what we have said in the two preceding paragraphs in this argument is in answer to the position taken by the mill company in the lower court. We insist, as we stated before, that the mill company did have notice when Dan Williams, its foreman in charge of the men and directing them in carrying on the business, knew all about the accident. His knowledge in a matter of this kind was the knowledge of the company. If he did not report it to the superintendent or the secretary or the president or the board of directors, that can be no fault of the insurance company, and if Williams did fail to report and do his

duty, for which he was employed, his employer, rather than the insurance company, should suffer.

In the case of

Northwestern Tel. Exch. Co. vs. Maryland Casualty Co., 90 N. W. 1110,

the court says:

“The evident object of the provision in the contract ‘shall give immediate notice’ was to enable the insurer at the earliest possible moment to place itself in possession of the circumstances and conditions surrounding the accident in order that it might be prepared to either defend or make settlement in case an action should be brought for resulting injuries.”

Continuing further the court says:

“In this case the foreman had knowledge of the accident, but failed to report it. Having knowledge of the accident he was bound to exercise his judgment and determine whether it was of sufficient importance for the basis of a claim in damages, and, having concluded that it was not, the company was bound by his decision. No notice was given to appellant until more than a year after the accident, which was not within a reasonable time, nor in compliance with the terms of the contract, and the effect was to release appellant from liability.”

In the Washington case of

Deer Trail, etc., Min. Co. vs. Maryland Cas. Co., 36 Wash. 46, 78 Pac. 135,

where a policy had been taken out by the min-

ing corporation, the mine was being worked by Yarwood Bros. and the net proceeds divided equally, the Yarwoods had no notice of the issue of the policy of insurance and the mining company had no knowledge of the happening of an accident, so that no notice was given to the insurance company for about eight months. No actual damage for failure to give notice was shown. The court, in construing the policy which provided for giving immediate notice, said:

“It is conceded that the accident occurred on May 19, 1900, and that no notice thereof was given to the appellant until January, 21, 1901. The excuse offered in the complaint, and by the witnesses for this failure to give notice, was that the Yarwood Brothers, who had charge of the mine and the men working therein, had no knowledge or notice of the policy. The Deer Trail Consolidated Mining Company, which procured the policy, had no notice of the accident. This condition of affairs was brought about solely by the neglect of one of the insured to notify the others of the contract, and, as a matter of course, is no excuse for failure to notify the appellant of the accident according to the terms of the policy. This court has heretofore held that ‘immediate notice’ in policies of this kind means within a reasonable time. *Remington vs. Fidelity & Deposit Co.*, 27 Wash. 429, 67 Pac. 989; *Kleebe vs. Long Bell Lumber Co.*, 27 Wash. 648, 68 Pac. 202; *Horsfall vs. Pacific, etc., Ins. Co.*, 32 Wash. 132, 72 Pac. 1028, 63 L. R. A. 425. Under this rule we think the lower court properly held that eight months was not within a reasonable time, and that

respondents did not comply with this requirement of the policy, which was a reasonable one for appellant's protection and benefit."

We have made diligent search in order that we may obtain all the authorities bearing upon this question. Therefore, as the facts are presented in this case, and considering the law, we cannot escape the conclusion that the lower court erred in overruling the motion for judgment.

2. This brings us to a consideration of the second assignment of errors, which is to the excepted instruction given by the court to the jury. This announcement of the court is as much as a comment on the testimony as it is the laying down of a principle of law.

The mill company sued upon the contract. A part of this contract is in writing and the remainder consists of acts done, if it recover, or of that which it failed to do if the insurance company recovers. The written policy was admitted without dispute. It speaks for itself. Before the mill company can recover in addition to the written policy which it holds it must establish that an accident occurred, that it had to respond because of the accident, and that precedent to all this it must have "at once" or "immediately" give notice of the accident. As

these are plain provisions of the agreement made between the parties, the question is then taken out of the realm of speculation and away from the jury, and left to the court to say whether the things done did or did not make a contract. The court had no right to ask the jury to determine whether a notice was given "at once," when it was admitted orally and in writing by the mill company that it was not given at once. We admit, of course, that "at once" in the contemplation of law does not mean instantaneously, but a reasonable and rational construction must be admitted, which means that under some circumstances at once would be within twenty-four hours, while again it might be within a week or ten days. Note the court veers from the statement in the policy "at once," and speaks of "prompt" notice. Now twelve months could not be considered as prompt when the mill was only fifty miles distant from the office of the general agent of the insurance company, and the general office of the mill company was in the adjoining block to that of the insurance company.

We do not know of any authorities we can cite to show that this instruction was contrary to the law, further than what has already been given upon

the argument referring to the first and third specifications of error. Therefore, we rest the case upon the law as cited.

We, therefore, submit that this is a case that ought to be reversed and ordered dismissed.

Respectfully submitted,

JOHN P. HARTMAN,
Attorney for Plaintiff in Error.

IN THE
United States Circuit Court
of Appeals
FOR THE
NINTH CIRCUIT

EMPIRE STATE SURETY COMPANY,
Plaintiff in Error,

vs.

NORTHWEST LUMBER COMPANY,
Defendant in Error

No. 2184

On Writ of Error to the United States District Court
for the Western District of Washington

Brief of Defendant In Error

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Brief of Defendant In Error

STATEMENT OF THE CASE.

These proceedings in error involve the correctness of a judgment for \$5,788.00 rendered by the District Court in favor of the Northwest Lumber Company, which we will hereafter refer to as the Mill Company, against the plaintiff in error, which we will hereafter refer to as the Insurance Company, upon a policy of

indemnity against employers' liability, dated June 27th, 1908, a full copy of which is contained in the transcript at page 12.

The accident which gave rise to the litigation occurred on November 4th, 1908, during the term covered by the policy. The Mill Company's business, which was covered by the indemnity policy, was that of cutting and loading logs, operating a general saw mill plant where the logs were sawed, and a logging railroad for carrying lumber and logs, all maintained by the Mill Company at or near Kerriston, Washington (Tr. p. 21). On the date mentioned, John Hall, one of the Mill Company's employees within the terms of the policy, was working in one of the logging and loading camps and was injured by having his leg broken. He was working under Dan Williams, a foreman of the gang or camp where the injury occurred. The Mill Company's representative at Kerriston was John McRae, who had general charge and control of all of the Mill Company's affairs at Kerriston. The general affairs of the Mill Company were in charge of an officer known as General Secretary and Treasurer, L. G. Horton, at Seattle (Tr. p. 21). Hall brought an action against the Mill Company which was defended by the Insurance Company under an agreement reserving certain questions in regard to the giving of notice under the terms of the policy (Tr.

p. 22). The case being thus defended resulted in a judgment for \$10,000.00, which on appeal was affirmed by the Supreme Court of the State, and was thereafter paid, with the addition of costs, by the Mill Company. Under the terms of the policy (Tr. p. 19) the Insurance Company's liability for injury of one person was limited to \$5,000.00, and the present suit was brought against the Insurance Company accordingly.

The facts of the case or the evidence are not set forth with much fullness in the bill of exceptions, presumably for the reason that the Insurance Company is seeking to avoid liability on the sole ground (as it claims) that notice was not seasonably given to it of the accident to Hall. The order settling the bill of exceptions (Tr. p. 26) certifies that "said bill of exceptions contains all the material facts as to whether notice was given under the terms of the policy occurring at the trial of said cause, together with the exceptions thereto, and all the material matters and things occurring upon the trial upon said point." It is conceded that the evidence was amply sufficient to sustain the judgment on all other points. We address ourselves, therefore, to the points presented by the record bearing upon the seasonableness of the notice given by the Mill Company to the Insurance Company.

John Hall, the injured man, and Dan Williams, the foreman of the gang or camp, in spite of their apparent English names, were both foreigners and spoke English very little. The same is true of the other members of the gang (Tr. p. 21). Whether Dan Williams, the foreman, was present at the time of the accident does not appear, it being stated only that Hall was working "under" Williams. It does not appear how soon after the accident Williams learned of it. It does appear, however, that "after the accident" (how long after is not disclosed) Hall was taken in charge by Williams and conveyed from the camp first upon a logging road to a public railroad, and thence to a hospital in Seattle, which was about forty miles distant (Tr. p. 22). Hall remained in the hospital about eleven months, namely: until October, 1909 (Tr. p. 22). It is not claimed by the Insurance Company that Hall ever made any demand on the Mill Company or made it known that he entertained a claim of liability against the Mill Company before he brought suit, and the record is absolutely silent upon this point. On October 26th, 1909, a little more than eleven months after the accident, Hall brought the suit in the Superior Court of King County against the Mill Company, which was defended by the Insurance Company under the stipulation before mentioned, and which resulted in the judgment for \$10,000 against the

Mill Company (Tr. pp. 21, 22). The facts so far stated appear by the transcript to be undisputed facts. Further, it may be added that the transcript discloses no evidence that any officer of the Mill Company had any knowledge of the accident until Hall's summons and complaint were served on the Mill Company on October 26th, 1909, unless the knowledge acquired by the gang or camp foreman, Williams, is chargeable to the Mill Company.

McRea, the Mill Company's superintendent at Kerriston, and Horton, who had general charge of all of its affairs, both testified that until suit was brought by Hall they had no personal knowledge of the occurrence of the accident, and that the other officers of the Company had no knowledge of it, and consequently they could not and did not make any report to the Insurance Company or give any notice of the accident or anything pertaining thereto until Hall's summons was served, whereupon notice was at once given to the Insurance Company (Tr. p. 21). The Insurance Company offered testimony *tending to show* that it had no knowledge or information in any way of the accident until after the service of the summons in Hall's case; "that because it did not have immediate notice of the accident it was greatly prejudiced and damaged in that it could not prepare for the trial of the case as it was bound to under the terms of

the policy if notice was immediately given; that it was unable to prepare to defend and defend the case and to obtain testimony, and that prejudice resulted against the defense because of the want of notice, all of which the witness claimed was prejudicial to the interest of the defendant, and all of which the witness claimed was caused by want of compliance with the terms of the policy insuring against loss'' (Tr. pp. 22, 23). Upon cross-examination of the Insurance Company's witnesses at the trial of the present case, it was shown that all persons who were eye-witnesses of the Hall accident were present at the trial of Hall's case and testified at his instance, except one whose whereabouts were unknown, and that the trial was held in the State of Washington about April 11th, 1910 (Tr. p. 23). Whether the Insurance Company's testimony did in fact show what it tended to show, as above stated, was of course a question of fact for the jury, who alone had a right to pass upon its weight and credibility. It will be noted that Hall's action was not tried until the Insurance Company had had nearly six months' time to prepare the defense after it was notified.

This is the record upon which a reversal of the judgment is sought by the Insurance Company.

ARGUMENT.

1. Errors 1 and 3 assigned by plaintiff in error raise substantially the same point, it being claimed that the trial court should have directed a verdict of non-suit and dismissal during the trial, or should later have rendered judgment for plaintiff in error notwithstanding the verdict of the jury. We shall therefore follow the course pursued by plaintiff in error and argue the two exceptions together.

EXCEPTIONS NOS. 1 AND 3.

Paragraph F of the policy (Tr. p. 16) provides that on the occurrence of an accident in respect of which claim can be made under the policy, the assured shall at once give written notice thereof to the Company; also that the assured shall give like notice with full particulars of any claim made on account of an accident so reported. It is not contended that any *claim* was made by Hall before beginning suit. The entire contention of the Insurance Company, therefore, is based upon the alleged ground that the Mill Company did not at once give written notice to the Insurance Company of the *accident*. It is a common provision of employers' liability policies to require notice of an accident to be given "immediately" or "at once." Such provisions have been frequently construed by the courts.

In construing a provision for immediate notice in a similar policy, the Supreme Court of New Hampshire said: "If a notice is given with due diligence under the circumstances of the case and without unnecessary and unreasonable delay, it will answer the requirements of the contract" (citing authorities). "Whether the notice was reasonably immediate, like the kindred question of what is a reasonable time, are questions of fact."

Ward vs. Maryland Casualty Company, 71 N. H. 262 (51 Atl. 900).

In the case of *Fidelity & Deposit Company vs. Courtney*, 186 U. S. 342, 46 Law Ed. 1193, the language used by the Supreme Court of New Hampshire in the case last cited was expressly adopted by the Supreme Court of the United States, and held to be lucid and accurate. This must settle the question of the meaning of the words "immediate" and "at once," and we cite no further authorities. All the cases cited by plaintiff in error either expressly adopt the same definition of "immediately" and "at once" or inferentially assume that meaning for the words.

In the brief of plaintiff in error (p. 21) there is a reluctant admission that notice within a reasonable time is all that is required under the authorities, but an attempt is made to place some arbitrary limit upon what can constitute a reasonable time. There is of course no

arbitrary limit. The question whether notice is given within a reasonable time under all the circumstances necessarily involves the cognate question whether the insured has exercised reasonable diligence, or in other words ordinary care, both in acquiring knowledge of the accident and in communicating that knowledge to the insurer.

It would of course be absurd to hold that the insured must give notice of an accident before he learns of it. On this point also we find the authorities unanimous.

In *Mandell vs. Fidelity & Casualty Company*, 170 Mass. 173, 49 N. E. 110, the contentions of the insurance company were much the same as in the case at bar. The court said: "These contentions are technical and, in our opinion, unsound. The policy was written *in view of the way in which the plaintiff's business was carried on*, and is to have a reasonable construction as a contract by which for an adequate consideration the defendant stipulated to give a real indemnity against the plaintiff's liability for injuries resulting from accidents caused by the horses and vehicles used in his business of transporting merchandise in the city streets." After referring to the manner in which the business of the insured was carried on, the court said: "It would therefore be impossible for notice to be given by the

plaintiff until he had himself acquired information and the requirement must be so construed that an effectual notice could be given in every instance. * * * We are of opinion that by the fair construction of the policy the plaintiff's duty to give notice of the occurrence of the accident now in question did not arise until he had knowledge of the accident and that the instruction to that effect was correct." Answering the contention of the Insurance Company that when the *insured's foreman* acquired such knowledge of the accident, such knowledge was imputable to the insured, the court said: "The plaintiff was not chargeable with knowledge of the accident because his servants had such notice. Neither his driver, stableman nor foreman were his agents for the purpose of giving notice to the company. They were concerned only with the transportation of merchandise and its incidents, and none of them were authorized or were expected by either party to the policy to do anything as his representatives with the defendant. There was no general agency conferred upon any of his employees. The plaintiff and defendant under such circumstances must be deemed to have intended that the notices would be given upon the knowledge or information of the plaintiff himself."

In the case at bar, the chief contention of the plaintiff in error appears to be that the gang or camp fore-

man, Williams, was such an agent of the Mill Company that his knowledge of the accident binds the Mill Company, so that by reason of his failure to communicate it the Mill Company must lose the indemnity which by the contract of the policy the Insurance Company agreed to give. In other words, it is contended that the trial court should have held, *as a matter of law*, that a gang or camp foreman is necessarily the representative of the company, charged with the power and duty of receiving and transmitting notice. On just what ground it can be claimed that a foreman is clothed with this important power as a matter of law, regardless of what may be his powers and duties as a matter of fact, it is hard to see. We suggest that the only reasonable view is that the powers and duties of the foreman are to be gathered from the evidence, consideration being given to all the circumstances of the case, and that the question whether the foreman is such a representative of the Mill Company that he is authorized and required to bind the company in this regard is a question of fact for the jury. No exception has been taken to the charge to the jury on the powers and duties of the foreman.

But if we should depart from this view and should assume that the status of the foreman is a question of law rather than of fact, then it must be held that the foreman is a mere fellow servant of the laborers work-

ing under him, and that the Mill Company is no more responsible for the knowledge of the foreman than for the knowledge of any other men there working. An accident to the foreman would have come within the policy the same as the accident to Hall or any other laborer. In the nature of things, a foreman might often be the responsible cause of an accident or might fear the placing of blame on himself and would naturally desire to make a good record for his gang. These considerations would naturally deter him from reporting an accident. As is said by the Supreme Judicial Court of Massachusetts, "the policy was written in view of the way in which the plaintiff's business was carried on," and it could not have been intended that the Mill Company would lose its indemnity because the foreman or other employees present should deem it for their interest to conceal the fact of an accident. Aside from this, his legal status is settled beyond all question by numerous decisions of the Supreme Court.

In *Alaska Treadwell Gold Mining Company vs. Wheelan*, 168 U. S. 86, 42 Law Ed. 390, where the legal status of a similar foreman (Finley) was in question, the court said: "Finley was not a vice-principal nor a representative of the corporation. He was not the general manager of its business or the superintendent of any department of that business. But he was merely the

foreman or boss of the particular gang of men to which the plaintiff belonged. Whether he had or had not authority to engage and discharge the men under him is immaterial. Even if he had such authority, he was none the less a fellow servant with them, employed in the same department of business and under a common head."

Nor can it be claimed that each gang or camp was a separate department of business so as to make a foreman the head of a department and therefore a vice-principal. Such a result follows only where a company has several departments of business which, in their relations to each other, are *as distinct and separate as though the work of each was carried on by a separate corporation.*

Baltimore & Ohio R. R. vs. Baugh, 149 U. S. 368;
37 Law Ed. 772.

This rule is, of course, so well settled by repeated decisions of the Supreme Court that it must be accepted as conclusive. So far, therefore, from its having been the duty of the trial court to hold that Williams was a vice-principal and representative of the Mill Company, the contrary is true, and if the status of Williams was fixed by law at all, he was a mere fellow servant with Hall and the other loggers.

We submit that the proper course is that adopted by the trial court, namely: to submit to the jury the question as to what the insured should reasonably have done under the circumstances of the case, both in the way of so managing its business as to make reasonable provisions for acquiring notice and also in exercising ordinary and reasonable care in arranging to communicate that notice to the insurer and in actually communicating it within a reasonable time under all the circumstances.

In *Woodrorton vs. Fidelity & Casualty Co.*, 190 N. Y. 41, 82 N. E. 745, the court said: "Strictly construed, the insured would be bound to give notice immediately after the accident whether he knew of the occurrence or not. This of course would be a wholly unreasonable construction and must be rejected (citing authorities). The condition of the policy is to be interpreted as meaning after the insured has become apprised of the accident, provided, however, he exercises reasonable diligence to acquire information. There is, therefore, cast upon him the duty of so regulating his business that he may be apprised with reasonable celerity of any accident that may occur in its conduct. Of course the duty, as already said, is not absolute. It requires only that reasonable care should be taken to acquire the information. If despite the exercise of reasonable care, the in-

sured fails to acquire the information till after a lapse of time, but on its acquisition gives prompt notice to the insurance company, he complies with the obligation of the policy." In conclusion, the court held that the entire question should have been submitted to the jury.

To the same effect is the later New York case of *Piercy vs. Frankfort Insurance Company*, 127 N. Y. Supp. 354; also *Mandell vs. Fidelity & Casualty Company*, 170 Mass. 173, 49 N. E. 110, and *Fidelity & Deposit Company vs. Courtney*, 186 U. S. 342 (cited above).

We do not deem it necessary to discuss at much length the question whether the evidence was sufficient to warrant the jury in finding that reasonable diligence had been exercised. The injured man was a foreigner and spoke little English. The foreman of the gang was a foreigner and spoke little English, and so were the other members of the logging crew. The Mill Company maintained a superintendent at Kerriston, John McRae, whose competency is not questioned. Naturally the general evidence in the case would disclose many attendant facts and circumstances. The jury had a right to take into consideration their common knowledge and general judgment as every-day practical men as to whether this business was conducted with the ordinary care that is commonly exercised by business men in

this part of the world. They, and not the presiding judge, were the tribunal to weigh the evidence and draw inferences. We have discovered no foundation for the statement in the brief of plaintiff in error (p. 16) that the accident demoralized one of the principal adjuncts of the Mill Company's business for a considerable time, or that the foreman took with him a special logging engine outfit on the occasion of the accident. The same is true of the assertion (p. 17) that Hall was mutilated and nearly killed, and that the camp was disbanded. If these alleged facts were not in evidence in the case, neither the judge nor the jury could be expected to be influenced by them. We think we have set forth all the facts that appear in the record in the statement of the case hereinbefore set forth, and we submit that on those facts the question is not for the judge but for the jury as to whether reasonable diligence and ordinary care were exercised by the Mill Company.

"After careful examination of the proofs, we are of opinion the court was right in submitting the case to the jury. The facts were in dispute and *when established different inferences might be drawn from them*. As such facts or inferences were drawn, the verdict could properly be for either party. Under such circumstances, a court cannot become a finder of facts and a decider of alternative inferences." (C. C. A. 3rd Circuit) *Slentz vs. Western Bank Note Company*, 180 Fed. 389.

"As a matter of course, the court cannot in such cases undertake to weigh conflicting evidence, and the

law is well settled that in passing upon a motion to take a case from the jury, it is the duty of the court to take that view of the evidence *most favorable to the party against whom it is moved to direct a verdict*, and from that evidence, *and the inferences reasonably and justifiably to be drawn therefrom*, determine whether or not under the law a verdict might be found for the party having the onus." (Per Ross, Circuit Judge, in *Janoski vs. Northwestern Improvement Company*, 176 Fed. 215.)

Time and again this court has held that the question of ordinary care and reasonable diligence is one of fact for the jury, not of law for the court.

An examination of the authorities cited by plaintiff in error will show that they do not in any substantial particular conflict with the rulings of the trial court.

The case of *California Savings Bank vs. American Surety Co.*, 87 Fed. 118, was decided on demurrer where there was of course no question touching the sufficiency of the evidence, as it was not evidence, but pleaded facts, that the court was considering. It appeared from the allegations of the complaint that there was a delay in giving the notice required by the policy and no excuse was pleaded. Plaintiff contended that the requirement of the policy as to notice was formal and immaterial. The court held otherwise. The case throws no light upon the question upon which the case at bar turns.

The case of *Frank Parmelee Co. vs. Aetna Life Ins. Co.*, 166 Fed. 741, was also decided upon demurrer and

involved chiefly the question whether an officer's return of service on a summons could be questioned collaterally. So far as the case is at all in point, it is favorable to the Mill Company, as it holds that in contracts of this kind to escape liability the *insurer must show* that the breach (if one exists, which in the case at bar we deny) is something more than a mere technical departure from the letter of the policy, and is a departure that results in substantial prejudice and injury. Of course, it follows that if the *insurer must show* prejudice and injury, it must show it to the satisfaction of the tribunal which passes on the questions of fact, namely, the jury, which is free to believe or disbelieve the evidence on that point.

The case of *Hope Spoke Company vs. Maryland Casualty Co.*, 143 S. W. 85, holds the insurance company liable. In so far as that case and this have anything in common, its holdings are favorable to the insured.

The case of *Woolverton vs. Fidelity & Casualty Co.*, 190 N. Y. 41, 82 N. E. 745, is a clear case in favor of the position of the trial court, as we have already pointed out.

The case of *N. W. Tel. Co. vs. Maryland Casualty Co.*, 86 Minn. 467, 90 N. W. 1110, appears to hold that

where an accident takes place in the presence of a foreman, the foreman is considered, as a matter of law, to be a representative of the insured so as to bind the insured by his knowledge of the accident. Assuming the case to be an authority for the proposition that an employe holding the position of foreman must occupy, as a matter of law, the status of a representative of the insured as between the insured and an insurance company, the case is plainly outside of the current of authority and stands by itself. Other authorities, including the Supreme Court of the United States, hold, as we have shown, that this question is a question of fact included within the general question of reasonable diligence and ordinary care, as the trial court held it to be. The Minnesota court is careful to limit its holding within a very narrow compass, as it declares: "A different question would arise had no agent or representative of the company *been present at the time of the accident*, and we do not determine what would be the effect in such a case." In the case at bar, there is no showing that the foreman, Williams, was present when Hall was injured, the only statement in the record being that Hall was working "under" Williams. The Minnesota court does not carry its holding so far as to say that knowledge of an accident afterwards acquired by a foreman, even soon after the accident, makes the foreman a repre-

sentative of his employer so that the employer loses his indemnity if the foreman conceals the fact of the accident.

In the case of *Deer Trail Mining Company vs. Maryland Casualty Company*, 36 Wash. 46, 78 Pacific 135, the policy was issued to three parties as the insured, namely: to the two Yarwood brothers and the Deer Trail Mining Company. The policy was obtained by the Mining Company without the knowledge of the Yarwood brothers. One of the Yarwood brothers obtained personal knowledge of an accident several days after it happened, but as he knew nothing of the policy, he did not notify the insurance company, nor did he notify the mining company. The mining company did not learn of the accident until suit was brought by the injured man, which was eight months after the accident. The court properly held that notice of the accident given after the lapse of those eight months was too late. W. J. Yarwood, *one of the insured, had personal knowledge of the accident a few days after it occurred*, yet no notice was given for eight months. Of course, the knowledge of one of the insured parties was the knowledge of all. It will be noted that the knowledge which is there imputed to the insured is the personal knowledge of one of the insured himself. The case is far from holding that the knowledge of a subordinate employee who learns of

the accident is binding on superiors to whom the knowledge is not communicated.

So far we have argued the case on the Insurance Company's theory (which was evidently accepted by the trial court) that the provision of the policy requiring notice of an accident is a condition precedent to any right of recovery by the Mill Company, and we think it plain that on such theory the trial court had no discretion but to submit the case to the jury.

If, however, the point should become material, we further submit that under the language of the policy in question, the provision requiring notice is a mere agreement on the part of the insured, a breach of which would not *ipso facto* void the policy. In order to defeat a recovery, the Insurance Company should be required to make an affirmative showing on its part that prejudice and loss resulted from the failure of the insured to comply with the provision. We think that all of the cases where a provision of this kind has been held to be a condition precedent will disclose on examination either (1) that the policy expressly stated that the provision was a condition precedent, or else (2) contained a warranty that it would be complied with by the insured, or at least, (3) recited that a compliance with the provision constituted a part of the consideration of the policy. Here there is nothing of that kind. The

provision in question is paragraph F (Tr. p. 16) and contains no language making the provision any stronger than a mere clause of the agreement. Under such circumstances, even a breach of the provision would not forfeit the policy.

In *Ward vs. Maryland Casualty Co.*, 71 N. H. 262, 51 Atl. 900, hereinbefore cited, the court said: "To the defendant's claim that their liability under the policy was ended by the plaintiff's failure to forward to the defendant's counsel the summons or paper served upon the plaintiffs in the O'Connell action immediately after such service, in compliance with the counsel's request, it is sufficient to answer that *there is no provision in the policy* making such failure a cause of forfeiture of the plaintiff's rights. Such failure would be competent evidence on the question whether the plaintiffs reasonably aided the defendants in securing information concerning the action. Its weight would depend upon the circumstances and must be determined by the tribunal charged with the duty of deciding questions of fact."

This case, as hereinbefore shown, has been approved by the Supreme Court in *Fidelity & Deposit Co. vs. Courtney*, 186 U. S. 342.

"The rule is that if policies of insurance contain inconsistent provisions or are so framed as to be fairly open to construction, that view should be adopted, *if*

possible, which will sustain rather than forfeit the contract.”

McMaster vs. Ins. Co., 183 U. S. 25; 46 Law Ed. 64.

Thompson vs. Ins. Co., 136 U. S. 287; 34 Law Ed. 408.

First National Bank vs. Ins. Co., 95 U. S. 673; 24 Law Ed. 563.

The reason is obvious. Insurance policies are prepared entirely by the insurance companies. If they intend that breach of any clause on the part of the insured forfeits the policy, they should say so. It is a fact of common knowledge that comparatively liberal forms of policies are often put forward by insurance companies as grounds for their being favored with the business of the public, and where a policy is put forward which contains no forfeiture clause, the insurer should not be allowed to claim a forfeiture. An extensive review of the authorities sustaining this proposition and applying it to policies such as that involved here is contained in the case of

Hope Spoke Co. vs. Maryland Casualty Co.,
Ark. ---, 143 S. W. 85,

which is hereinbefore cited, and which is also referred to in the brief of the plaintiff in error.

A similar holding is made by the Circuit Court of Appeals for the 7th Circuit in the case of

Frank Parmelee Co. vs. Aetna Life Ins. Co., 166
Fed. 741,

(also cited by plaintiff in error).

Also *Anoka Lumber Co. vs. Fidelity & Casualty Co.*,
--- Minn. ----; 30 L. R. A. 689.

If this court were free to find the facts and draw the inferences therefrom instead of having the jury do so, the finding should be that the Insurance Company has not shown that the time which elapsed before it received notice of the accident caused it any injury. The testimony of its witnesses *tending to show* prejudice is fully met by the fact (Tr. pp. 22, 23) that counsel for the Insurance Company took charge of the defense as soon as Hall's action was begun; that the Insurance Company and its counsel had thereafter five months for preparation before the trial took place, and that all the eye-witnesses of the accident were present and testified at the trial of Hall's case, except one whose whereabouts was unknown, and that the record fails to disclose that the absent witness could have testified to any fact not already before the court.

EXCEPTION No. 2.

The bill of exceptions does not contain the judge's charge. The only exception taken by plaintiff in error was to one paragraph (Tr. pp. 23, 24). It must be pre-

sumed, therefore, that the remainder of the charge correctly stated the law, at least to the satisfaction of plaintiff in error. We submit that the paragraph excepted to is fully as favorable to plaintiff in error as it could be under the authorities. In our view, the charge was unduly favorable to plaintiff in error, as it is apparent from the paragraph excepted to that the judge charged the jury that a compliance with the clause of the policy requiring the giving of notice was a condition precedent to the right of recovery. This is apparent from the fact that in the paragraph excepted to the court said:

“The jury, therefore, are required to determine from the consideration of the evidence in the case *whether that condition of the policy has been met by the plaintiff*. That notice was given is undoubtedly true, as shown by the evidence. The question is—was it given at once, and that is a question for the jury to determine from a consideration of all the circumstances in the case *whether the plaintiff acquired its rights under this policy by giving prompt notice of the happening of the injury*.”

This is too favorable to Plaintiff in Error, as there was no forfeiture provision in the policy so far as concerns the clause in question. The remainder of the paragraph excepted to is fully supported by the authorities which we have hereinbefore cited, and especially by the case of *Fidelity & Deposit Co. vs. Courtney*, 186 U. S. 342, where the court said: “We think the trial court was right in refusing to instruct as a matter of law that the notice was not given as soon as reasonably practicable

under the circumstances of the case or without unnecessary delay, and in leaving the jury to determine the question whether the receiver had acted with reasonable promptness in giving the notice."

We respectfully submit that if any error is shown by the record, it is error in favor of the Plaintiff in Error, that the judgment against it is right and should be affirmed.

Respectfully submitted,

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